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Court Review

Volume 49, Issue 1

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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ARTICLES

- 4** National Consortium on Racial and Ethnic Fairness in the Courts
Celebrates 25 Years

Edward C. Clifton and H. Clifton Grandy

- 6** The Third Branch of the Third Sovereign: A Brief History of
Tribal Courts and Their Perception in the Supreme Court

Keith Richotte, Jr.

- 14** Knowing the Communities We Serve

Liana Fiol Matta

- 24** The Supreme Court's Emerging Jurisprudence on the
Punishment of Juveniles: Legal and Policy Implications

Joanna L. Visser and Jeffrey J. Shook

- 40** Achieving Racial and Ethnic Fairness in Drug Courts

Douglas B. Marlowe

- 48** The Court's Brain: Neuroscience and Judicial Decision Making
in Criminal Sentencing

Kimberly Papillon

- 64** Addressing Implicit Bias in the Courts

Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, and Jennifer K. Elek

DEPARTMENTS

- 2** Editor's Note

- 3** President's Column

- 72** The Resource Page

Court Review

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION
Volume 49, Issue 1

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EDITOR'S NOTE

Recognizing the ever-changing landscape and the increasing challenges that face justice systems committed to achieving the promise of “equality before the law,” the National Consortium on Racial and Ethnic Fairness in the Courts works to share its collective knowledge about best practices within court systems for achieving fairness and access to justice for all. In celebration of the consortium’s 25th anniversary, *Court Review* is pleased to present a special issue in collaboration with this organization.

The issue begins with an article by Professor Keith Richotte, Jr., who provides a brief history of tribal courts. The article discusses how tribal courts have blended older tribal common law with Western-inspired sources of law, resulting in innovative ways for tribes to make the common law of the tribal nation speak to issues of the present. Unfortunately, the innovative work that many tribal courts are engaged in is not always recognized and appreciated outside of Indian Country. As a consequence, there remains a fair amount of trepidation about tribal courts. The article posits that this trepidation is founded in the same presumptions about tribal peoples that existed in the nineteenth century and were expressed in the Indian law cases of that era.

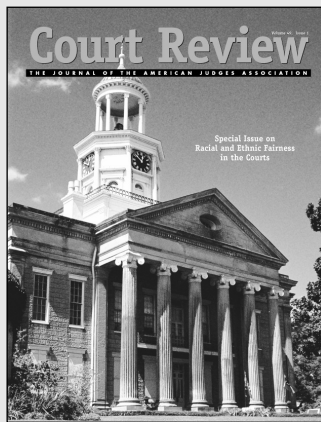
This concept of understanding the communities we serve is then further examined by the Honorable Liana Fiol Matta, who discusses the need for judges to understand the dynamics of communities in poverty and the significant barriers they face to accessing justice. Justice Fiol Matta suggests to all judges that “true access to justice can only be achieved when a judge uses the law, not as an end in itself, but as a tool for justice.”

Next, lawyer Joanna L. Visser and Professor Jeffrey L. Shook provide timely views on recent United States Supreme Court decisions exploring under what circumstances states are permitted to give juveniles life sentences without the opportunity for parole. Although this article is not explicitly about racial and ethnic fairness in the courts, readers should keep in mind the drastic overrepresentation of minority youth in our nation’s justice system.

In other articles:

- Douglas Marlowe provides a review of what is currently known and what needs to be known about racial and ethnic impacts in drug courts.
- Kimberly Papillon provides an in-depth explanation of the neuroscience behind judicial decision-making in the criminal context, demonstrating how the application of the four principles of criminal sentencing (i.e., retribution, rehabilitation, deterrence, and incapacitation) may be affected by these neurological processes.
- Pamela Casey and coauthors outlines seven research-based strategies that have been identified for reducing the influence of implicit bias in decision making.

—Liz Neeley



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 13 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Cover photo, Mary Watkins. The cover photo is the Old Court House in Vicksburg, Mississippi. Completed in 1860 and used as a courthouse until 1939, the building has been used as a museum since 1948. According to the museum website (www.oldcourthouse.org), the American Institute of Architects once named the building as one of the 20 most outstanding courthouses built in the United States.

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President's Column

Toni M. Higginbotham

The American Judges Association is pleased to salute the work of the National Consortium on Racial and Ethnic Fairness in the Courts through this special issue of *Court Review*. The Consortium is celebrating its 25th anniversary with a conference being held March 20 to 23 in Washington, D.C.

This cooperative effort between the AJA and the Consortium is typical of the ways in which AJA partners with—and helps to spread the reach of—other organizations interested in similar objectives. One of the members of the Consortium's Board of Directors, Liz Neeley, is also a member of *Court Review's* Editorial Board. She approached *Court Review's* coeditors, Steve Leben, a past AJA president, and Professor Alan Tomkins, about this collaborative effort. In keeping with the AJA's long tradition of working with other groups, they readily agreed.

Among the AJA's great strengths are its flexibility to respond to situations and its willingness to collaborate with other organizations. The AJA is an independent association, not a subgroup of a larger entity, and we have not divided our organization into separate groups for different segments of our membership. AJA's member judges are found throughout the United States, and we also have a significant number of Canadian judges as members. We are mainly state and municipal judges, but we also have federal judges as members. We encourage our officers, our Board of Governors, our education planners, and our publication editors to be active and innovative. When contacted by the Consortium, the AJA was able to collaborate easily and effectively because of our organizational structure and track record.

Over the years, the AJA has engaged in joint ventures with many different groups. We have worked closely over the years with the National Center for State Courts, including projects like devoting a special issue of *Court Review* to the National Center-sponsored conference on public trust and confidence in the courts. We held a joint meeting with the National Association for Court Management, and we are working on a

joint meeting with the National Association of State Judicial Educators. We have combined our annual educational conference with the state judiciaries in several states in recent years, enhancing the programming offered both at our conference and to judges in those states.

I raise the subject of the AJA's collaborative work with other organizations so that readers of this special issue—AJA members and others—may keep in mind the possibility of future collaboration on issues of interest. We are always glad to hear

from AJA members about suggested initiatives, projects, or educational efforts that the AJA might pursue. We are also glad to hear from those presently outside the AJA membership as well. And, of course, we would also love to bring more of you who are not currently AJA members into our group.

Our dues are a reasonable \$150 for active judges (\$50 for retired judges). Members receive quarterly issues of *Court Review*, regular email

updates on issues of interest to judges (like new ethics cases or advisory opinions), and our electronic newsletter, *Benchmark*, which reports on AJA activities. You also become part of an active association that works to make its members better judges and the judiciary even better at providing justice. And you can attend the AJA's annual educational conferences. No other organization has provided better judicial education programs over an extended period of time than the American Judges Association, which recently held its 50th annual educational conference.

So we salute the National Consortium on Racial and Ethnic Fairness in the Courts on the work it has done during its 25 years in existence. We are glad that the Consortium reached out to the AJA to collaborate with it. We hope that those who read this issue—AJA members and others—will keep AJA in mind as you think about ways in which the performance of judges and their courts may be improved.

I hope to see you at an AJA conference soon.



National Consortium on Racial and Ethnic Fairness in the Courts Celebrates 25 Years

Edward C. Clifton & H. Clifton Grandy

Recognizing the ever-changing landscape and the increasing challenges that face justice systems committed to achieving the promise of “equality before the law,” the National Consortium on Racial and Ethnic Fairness in the Courts (“National Consortium”) brings together thought leaders and delegates of state justice systems from around the country to share their collective knowledge about best practices within their court systems for achieving fairness and access to justice for all. For 25 years, the National Consortium has served as a conduit to provide a forum for discussions on relevant topics pertaining to identifying and eliminating bias against people of targeted racial and ethnic groups both through its annual conference and through peer-to-peer technical assistance. Additionally, the National Center for State Courts, as secretariat for the National Consortium, serves as a warehouse of information by compiling the annual reports that the National Consortium members present at annual meetings; bibliographies from each jurisdiction; and information regarding task force/commission structure, governance, staffing, research, and the issues addressed by implemented projects (http://www.ncsconline.org/D_Research/ref/). Thanks to the collaborative efforts between the Board of the National Consortium and the American Judges Association, we are happy for the opportunity to provide education through a new forum, *Court Review*.

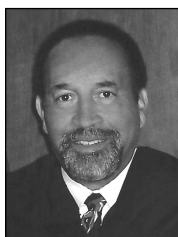
This March the National Consortium will celebrate its 25th Anniversary during its annual conference in Washington D.C. (March 20-23). The conference, titled *Celebrating the Past as We Envision and Embrace the Future*, offers a fantastic agenda filled with nationally renowned speakers on a broad range of topics.

In collaboration with the United States Holocaust Memorial Museum, the conference will offer an in-depth look at the failure of the judicial system in Nazi Germany and an exploration of whether such a failure could occur in the U.S. court system. Other days of the conference will include sessions on the intersections of race, ethnicity, gender, and poverty; the history and future of the National Consortium; perceptions of justice held by juveniles and young adults; best practices in ensuring access to justice; and fairness and access in the criminal, juvenile, civil, and family court sys-

tems. We encourage you to register online at <http://www.consortiumonline.net/>.

Although the National Consortium recognizes that courts across our nation are faced with unprecedented budgetary and program challenges, the National Consortium maintains that courts must recognize they have an obligation to treat **all** of the people that come before them fairly. This obligation of fair treatment should apply equally to racially and/or ethnically diverse populations.

On behalf of the current members of the Board of Directors of the National Consortium, as well as the emeritus members of our Board of Directors, we would like to extend our profound appreciation to Judge Donovan Foughty (N.D.), Judge Orlinda Naranjo (TX), Dr. Yolande Marlow, Ph.D. (N.J.), Dr. Elizabeth Neeley, Ph.D. (Neb.), Lisette (Mimi) McCormick, Esq. (Pa.), Erica Chung (Wash.), Gregory Conyers, Esq. (Mich.) and John Douglas (Colo.), and the members of this Ad Hoc Project Committee for its time and effort in furthering this publication.



Edward C. Clifton (J.D. UCLA 1975) has served as an Associate Justice of the Rhode Island Superior Court since September 1994. From 1996 until the present, he has been a member of the Rhode Island Supreme Courts' Permanent Advisory Committee on Women and Minorities, serving as chair from 2010 until 2012. Judge Clifton has been a member of the Board of Directors of the National Consortium on Racial and Ethnic Fairness in the Courts since 2006, becoming president/moderator in 2012.



H. Clifton Grandy, J.D., ICM Fellow, is a senior court manager for the District of Columbia Courts focusing on fairness and access issues. He is the secretary/treasurer and a board member of the National Consortium on Racial and Ethnic Fairness in the Courts and was the director of the First National Conference on Racial and Ethnic Fairness in the Courts, which was held in 1995.

“The National Consortium on Racial and Ethnic Fairness in the Courts is an extraordinary voice for the judiciary and the justice system on the issues of race and justice in our courts. It has played an important role in ensuring fairness in the justice system.

The most recent efforts with respect to language access to the courts will, I know, prove very fruitful in again providing equal access to justice. I congratulate the Consortium and its historical contributions. I know the Consortium has a great future in these areas.”

Hon. Richard B. Teitelman
Chief Justice
Missouri Supreme Court

“It can—and must—be said that the Consortium has served as a catalyst for innovative partnerships, engaging public discourse, and creative problem solving, from which Maryland has benefited. Again, on behalf of the Maryland Judiciary, I congratulate you for your twenty-five years of services to the state judiciary and, most important, to the citizens they serve.”

Hon. Robert Bell
Chief Judge
Maryland Court of Appeals

“The Consortium has been a valuable resource over the years. We look forward to continuing our partnership as we work together to ensure that all persons have equal access to our courts.”

Hon. Petra Jimenez Maes
Chief Justice
Supreme Court of
New Mexico

The Third Branch of the Third Sovereign:

A Brief History of Tribal Courts and Their Perception in the Supreme Court

Keith Richotte, Jr.

No other branch of any government at any level in the United States faces the same sorts of unique challenges, jurisdictional quandaries,¹ resource limitations, and threats to its authority than tribal courts. Yet, despite the challenges tribal courts face—not the least of which is a wariness and sometimes outright hostility from other American courts—tribal nations and especially tribal courts have grown increasingly adept and innovative at finding ways to overcome the myriad of hurdles that confront them.

The role of today's tribal court often requires it to blend two different, although not necessarily competing, legal traditions: older tribal common law and more recent Western-inspired sources of law, such as constitutions and codes. Many tribal courts have risen to the challenge, finding innovative ways to make the teachings, traditions, and rules of previous generations—the common law of the tribal nation—speak to the issues of the present and provide guidance in how to read the contemporary law of the community. This valuable work has helped tribal nations develop and engage in American legal, political, and financial life like never before, with substantial benefits to tribal peoples in a changing world with greater opportunities.

Unfortunately, the innovative work that many tribal courts are engaged in is not always recognized and appreciated outside of Indian Country. As a consequence, there remains a fair amount of trepidation about tribal courts, particularly in other American courts and perhaps especially in the Supreme Court. This trepidation is often founded by the same presumptions about tribal peoples that existed in the nineteenth century and were expressed in the Indian law cases of that era.

It is time for judges at all levels to reexamine the bases of

their perceptions about tribal courts. This article hopes to provoke that critical reflection through a brief examination of the history of tribal courts. The first section of the article will discuss the history of tribal adjudication and some of the innovation in which tribal courts are currently engaged. The second section will trace the Supreme Court's understanding of tribal courts and that understanding's lack of change from its nineteenth-century roots. The conclusion will return to the discussion of what American courts and judges can and should do to rectify the situation.

THE DEVELOPMENT OF TRIBAL COURTS

As tribal nations have become increasingly sophisticated and have extended their reach beyond the boundaries of their reservations and communities in recent years, tribal courts have become an increasingly important component to the success and vitality of those nations. Although tribal nations have always engaged in dispute resolution and the effectuation of justice, tribal courts are playing a more practical and visible role both inside and outside of their nations. Tribal courts are shaping the future in ways never before thought to be possible. To more fully understand their current role within their communities, it is important to know something of the history of tribal courts.

It should be noted at the outset that any description of the history of tribal courts or where they stand now is going to be particularly broad and cannot adequately account for the complete range of experiences of all tribal nations and courts. Akin to the descriptor "European," terms like "Native American," "American Indian," or "Native" are relatively loose, describing

Footnotes

1. Determining who has jurisdiction over criminal activity can be a particularly confusing analysis that requires an assessment of several questions, including the status of the land on which the crime occurred, the type of crime committed, the race of the perpetrator(s) and other interested parties, and other assorted factors. To use the criminal context as an example, in general, the federal government has the authority to prosecute Natives for "major" crimes and non-Natives for any crime that occurs in "Indian Country" under various federal statutes. See Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9; 23 Stat. 362, 385 (1885) (codified at 18 U.S.C. § 1153); Indian Country Crimes Act, Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1152). However, if the reservation upon which the crime occurred is a "Public Law 280" state, then the state will likely have the same criminal jurisdiction that the federal government otherwise would have had. See Public

Law 280, 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, and 28 U.S.C. § 1360. Nonetheless, Public Law 280 exempts certain tribal nations from the statute, thus maintaining federal jurisdiction on those reservations. Tribal nations have concurrent jurisdiction over Natives, subject to some limitations on sentencing that will be discussed later in this paper, and no jurisdiction over non-Natives, which will also be discussed later in this paper. See Indian Civil Rights Act, 25 U.S.C. §§ 1301-03, and *Olipphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). For a concise analysis that offers some guidance through the jurisdictional maze of criminal law in Indian Country see DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 483-487 (6th ed. 2011). Civil jurisdictional questions involve a slightly different analysis that is nonetheless confusing in its own right.

many groups of peoples within a wide geographic area with quite a bit of diversity among themselves. Nonetheless, some generalizations are reasonably applicable to the many groups.

Before contact with Europeans, tribal nations resolved disputes within the nations through their own processes, and many tribal nations continued to engage in their own dispute resolution for some time after contact. While many of the numerous treaties in the long history of relations between tribal nations and the United States contained some language—often referred to as “bad men” clauses—as to who had the authority to punish wrongdoers, in general tribal nations punished their own, and the federal government was authorized to punish non-Indians who committed wrongful acts on tribal lands or toward tribal peoples. A brief example of one tribal adjudicative process is illustrative of not only the tribal system but of the purposes and goals of that system.

In the summer of 1881, Crow Dog, a leader among the Brule Lakota, killed Spotted Tail, another member of the Brule Lakota. Although it is likely impossible to ever know exactly why Crow Dog took this action, internal tribal politics were undoubtedly involved. Crow Dog was a leader among the Brule, having arrived at his position among the community through traditional means. Spotted Tail, on the other hand, had been appointed by the federal government as a tribal leader and enjoyed the spoils of a relationship with the federal government.² The two men were political rivals who looked to disrupt each other’s authority and were potentially at odds for personal reasons as well.³

The Brule Lakota community moved quickly to address the crime and resolve the dispute among the families. While it was the federal Indian agent on the reservation who called the tribal council the day after the killing, the council proceeded under Brule law.⁴ Peacemakers were sent to both families to negotiate a settlement, to restore Spotted Tail’s family to as near to whole as could be accomplished, and to return the greater community to a position of balance and harmony. Crow Dog and his family agreed to give \$600, eight horses, and a blanket to the family of Spotted Tail—an astounding sum in the 1880s, and a show of respect and deference for the slain man.⁵

It is perhaps easy to misunderstand the arrangement between the families of Spotted Tail and Crow Dog that was facilitated by the leaders of the Brule Lakota, and that misunderstanding may help to explain at least some of the federal

government’s insistence in interjecting itself ever more deeply into internal tribal affairs. The negotiated settlement was not a payment of hush money or an example of a privileged member of a society buying his way out of justice. Rather, it was reflective of the restitutive nature of Brule Lakota society, and many tribal societies. The purpose of criminal justice was not offender-and-punishment focused; instead, the focus was on the victim’s family, the community, and the offender’s responsibility to make restitution to the best of his or her ability. In general, traditional tribal communities were focused less on the crime itself and more on how to correct the ill effects of the crime. Writing about Crow Dog’s family’s payment to the family of Spotted Tail, one commentator noted that it was not “blood money,” but rather the payment was “an offer of reconciliation and a symbolic commitment to continuation of tribal social relations.”⁶ This is just one example of the community-centered vision of crime, law, and restitution within tribal communities, as the Brule were hardly the only tribal nation with a deep and sophisticated appreciation for jurisprudential reasoning.⁷

Yet, by the late nineteenth century, the federal government was rethinking and reconfiguring its political relationship with Native peoples, and began engaging in a concerted effort to destroy tribalism in both the quest for tribal lands and in the name of civilization. The period of time from the early 1870s to the early 1930s is often dubbed the “Allotment Era” after the Allotment Act,⁸ or Dawes Act, the major piece of congressional legislation that divested tribal nations of approximately ninety million acres of land (roughly equivalent to the state of Montana) and symbolized a new era of federal policy of forced assimilation toward Native peoples.⁹ The general tenor of the times for the politicians, bureaucrats, reformers of the era, and other “friends of the Indian” was perhaps best summed up by one of the major figures of the time and the man most responsible for the proliferation of Indian boarding schools, Richard Henry Pratt. Succinctly describing the second biggest goal of the Allotment Era (behind acquiring additional tribal lands), Pratt claimed that

A brief example of one tribal adjudicative process is illustrative . . . of the purposes and goals of that system.

2. SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 108 (1994).

3. *Id.* at 108-09.

4. *Id.* at 110.

5. *Id.*

6. *Id.* at 105.

7. For example, in their classic text *The Cheyenne Way*, legal philosopher Karl Llewellyn and anthropologist E. Adamson Hoebel studied the legal structure and reasoning of the Cheyenne. Although the text is burdened by language and assertions that many would find troubling today, the two scholars nonetheless detail a complex and reflective system of law that they appear to have anticipated their readers would find unfathomable. “It might bear a surface appearance of romanticizing for us to attribute legal genius to

a people of those aboriginal American Plains which have long been thought to be so relatively barren of legal culture, if the data has not been laid before the reader.” K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 310 (1941). For an enlightening reflection on how tribal visions of law, peace, and commitment affected early treaty negotiations, see ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* (1999).

8. Indian General Allotment Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (1887) (codified at 25 U.S.C. § 331), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. 106-462, § 106, 114 Stat. 1991, 2007 (2000).

9. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 77-79 (Neil Jessup Newton ed., 2012) [hereinafter, COHEN’S HANDBOOK].

Today it is estimated that there are over three hundred tribal courts currently operating in Indian Country.

he wanted to “[k]ill the Indian and save the man.”¹⁰

True to the spirit of the Allotment Era, the federal government sought to replace traditional tribal methods of adjudication with a Western model under the guise of bringing civilization to the supposedly simple savages. In the late nineteenth and early twentieth centuries, Indian agents on a

number of reservations established tribal courts based on an American model. The earliest efforts to establish these courts were spearheaded by Secretary of the Interior Henry M. Teller, who saw them as a tool to disrupt the supposedly heathenish ways of tribes and to diminish the influence of tribal leaders, especially medicine men, who resisted the efforts of the federal government.¹¹ These early tribal courts, called the Court of Indian Offenses or sometimes CFR courts (in reference to their establishment through the Code of Federal Regulations¹²), were staffed by either members of the Indian police—another weapon wielded by Indian agents to destroy tribalism—or by an influential member of the community who had gained enough of the agent’s trust to be appointed with the task of spreading civilization by punishing those who continued to practice traditional ways or who otherwise caused disruption within the tribal community. Put simply by one commentator, “A major goal for these courts was the destruction of tribal law.”¹³ A number of CFR courts continue to operate on reservations today, although their purpose and scope have been amended to benefit the administration of tribally generated law, rather than to purposefully destroy it.¹⁴

In the wake of the Allotment Era, particularly at points when Congress has been more supportive and receptive of tribal governments, many tribal nations developed their own Western-influenced court systems. Again, the diversity of experiences among tribal nations makes it difficult to generalize about these courts. For instance, although some of these tribal-court systems are relatively new, many are now decades old with a growing body of caselaw to draw upon. And while some were established through the acts of tribal legislatures and exist as part of a tribal code, others are established as a separate branch of government guaranteed through a tribal constitution. Today it is estimated that there are over three hundred tribal courts currently operating in Indian Country.¹⁵

Perhaps the most sophisticated, well-rounded court system in Indian Country belongs to the Navajo. The “modern” Navajo court system began in 1892 with the establishment of

a CFR court on the reservation.¹⁶ Like any other Native community, the Navajo had a system for resolving disputes before the influence of Western forces and were forced to adapt to their circumstances when the CFR court was established. Nonetheless, the Navajo rid themselves of the CFR court and established a tribal court under their own authority in 1958,¹⁷ established an appellate court in 1978,¹⁸ and engaged in reforms in 1985 that led to the current Navajo Supreme Court, the highest court in the Navajo Nation.¹⁹

The reforms of the 1980s were responding both to a political crisis within the Navajo Nation and to, as former Navajo Supreme Court Associate Justice Raymond D. Austin has put it, a “general consensus among Navajo judges that the Navajo Nation needed an alternative to the Western form.”²⁰ During this period, the Navajo court system began a concerted and deliberate effort to re-infuse the law of the nation—mostly found in the tribal code and through the structures of tribal government that mimicked an American model—with the precepts of Navajo common law, which were more suited to the needs of the community.

By deciding that they were going to “empahsiz[e the] use of Navajo normative precepts,”²¹ the Navajo courts did not reject, dismantle, or discard the laws, procedures, or rules that appeared to be “Western” or that had been established by the duly elected tribal council. Rather, the court began reading those rules in a manner in accordance with the foundational, traditional law of the Navajo. A deep examination of Navajo common law is beyond the scope of this article. (For those who are interested, Associate Justice Austin’s book, *Navajo Courts and Navajo Common Law*, offers an exceedingly clear detailing.) However, it suffices to note that one of the primary goals of the Navajo worldview is to achieve a place where all things are at balance and working in harmony with one another.²² Not unlike reading state and federal law against the backdrop of the American constitution, Navajo courts have steadily built a caselaw that reintroduces this foundational law into contemporary cases and settings and reads “modern” law in accordance with Navajo common law. Other tribal courts have also followed this model and are reading their “modern” law in accordance with their “traditional” law.

Another more modern rearticulation of tribal common law has been what are generally called peacemaker courts. These tribal courts generally operate in a different process whereby the adversarial system is eschewed in favor of a more integrative event where a community leader or mediator brings a victim, offender, and family and friends of the parties together to discuss the offending behavior, to give all parties a chance to speak, and to come to a consensual result in the dispute. Meetings of peacemaker courts might be preceded with a meal

10. Quoted in *id.* at 76.

11. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 646-47 (1984).

12. COHEN’S HANDBOOK § 4.04, at 266.

13. HARRING, *supra* note 2, at 186.

14. COHEN’S HANDBOOK § 4.04, at 266.

15. GETCHES ET AL., *supra* note 1, at 410.

16. RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW*: A

TRADITION OF TRIBAL SELF-GOVERNANCE 19 (2009).

17. *Id.*

18. *Id.* at 29.

19. *Id.* at 31.

20. *Id.* at 39.

21. *Id.* at 37.

22. *Id.* at 54.

and a prayer to emphasize both the communal and spiritual aspects of the event that is about to take place.²³ As part of its reforms in the 1980s, the Navajo court system created peacemaker courts,²⁴ but they have hardly been the only tribal communities to do so.²⁵ Peacemaker courts not only more closely align with more traditional tribal adjudicative systems (as was employed in the Crow Dog/Spotted Tail incident), but they also often generate a greater sense of involvement and engagement for the offender, victim, and other interested parties that can be missing in the more formal processes found in American courts.

The Navajo court system's adoption of Navajo common law and peacemaker courts are just two quick examples of the means through which tribal courts are contributing ever more to their nations and are becoming significant pillars of the community. Tribal courts do still face a number of practical challenges, including financial difficulties and a small pool of legal talent. But they are beginning to meet those challenges in new and necessary ways and are establishing themselves as innovative forces for the greater good. By interjecting tribal common law into modern settings and by creating processes that fit the community, tribal courts are doing the practical work of not only resolving disputes among the community but keeping the traditions and spirit of the people alive.

AMERICAN PERCEPTIONS OF TRIBAL ADJUDICATION

Despite their increased importance, tribal courts continue to face a number of obstacles not faced by other American courts—some more surmountable than others. Perhaps the biggest hurdle that tribal courts and other forms of tribal dispute resolution have traditionally faced is a lack of faith in the process, and often outright scorn, from non-Native peoples and institutions. Tribal forms of dispute resolution, whether they be the more contemporary tribal courts of today or older systems employed by tribal nations in the past, have been routinely derided as inadequate or otherwise inappropriate. Quite often, the strongest criticism has come from Supreme Court justices, both in the past and more contemporarily. The lack of faith that American officials have shown tribal courts—not to mention tribal societies, ways of thought, and world views—throughout the years has been one of the biggest roadblocks to establishing and maintaining the authority of tribal adjudication.

The federal government began seriously interjecting itself in the tribal adjudicative process in the late nineteenth century during the Allotment Era. Two cases from the 1880s that surrounded another major piece of federal legislation perhaps best exemplify the distrust the federal government and the general American populace held for tribal adjudicative methods in the Allotment Era, the legacy of which continues to influence non-Native attitudes about tribal courts.

In 1883, the Supreme Court handed down *Ex Parte Crow Dog*,²⁶ a case that, on the surface, looked like a victory for tribal interests, but that nonetheless paved the way for further congressional intrusions into Indian Country. The facts of the case have already been described in this article, with the family of Crow Dog offering restitution to the family of Spotted Tail under Brule Lakota law. The issue was resolved peaceably within the community.

The federal government read the situation much differently, and members of the Office of Indian Affairs (the precursor to today's Bureau of Indian Affairs) saw the incident as an opportunity to extend their influence over tribal life and further the mission of "civilizing" Native peoples.²⁷ Conceived as a test case, the Indian agent on the Brule reservation had Crow Dog arrested even though the agent was aware that the matter had been settled within the tribal nation.²⁸ In the spring of 1882, Crow Dog was tried and convicted in a federal court²⁹ in a case that everyone anticipated was headed to the Supreme Court.³⁰

The High Court did hear the case and rendered a decision in 1883.³¹ While the Court ruled in favor of tribal interests in the case, stating that there was no federal statute or treaty provision that gave the federal government jurisdiction over Indian-on-Indian crime in Indian Country, the opinion was as friendly to the losing side as one could imagine. Justice Stanley Matthews' opinion either showed no knowledge of the Brule system of justice that had already resolved the matter or no regard for it in suggesting the unfairness of subjecting supposedly simple savages such as Crow Dog to the legalities of a higher civilization. Justice Matthews stated:

"[Our system] tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality."³²

Despite his seeming (and condescending) concern for the fate of tribal peoples, Justice Matthews nonetheless characterized the issue as one of jurisdiction, as opposed to morality, noting that

The lack of faith that American officials have shown tribal courts . . . throughout the years has been one of the biggest roadblocks to . . . the authority of tribal adjudication.

23. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 78 (1997).

24. *Id.* at 39.

25. See John M. Ptacin, Jeremy Worley, & Keith Richotte, *The Bethel Therapeutic Court: A Study of How Therapeutic Courts Align with Yup'ik and Community Based Notions of Justice*, 30 AM. INDIAN L. REV. 133 (2005-2006).

26. 109 U.S. 556 (1883).

27. HARRING, *supra* note 2, at 115.

28. *Id.* at 110.

29. *Id.* at 124-25.

30. *Id.* at 118.

31. *Crow Dog*, 109 U.S. 556.

32. *Id.* at 571.

When tribal nations began developing their own Western-influenced courts . . . , Congress also began to take a greater interest.

federal jurisdiction, “in such a case, requires the clear expression of Congress, and that we have not been able to find.”³³ Justice Matthews’ implication was clear: were Congress to act, then the Court was likely to rule differently in the future.

Congress accepted Justice Matthews’ invitation a year later and passed the Major Crimes Act³⁴ in 1885. The law

extended federal jurisdiction to Indian Country over seven “major” crimes (and remains good law today, with additional crimes enumerated since its original passage). Armed with this congressional blessing, federal prosecutors began trying Native peoples for activities that originated on reservations, further implicitly rejecting tribal methods for dispute adjudication.

One year later, in 1886, the Supreme Court was presented with a constitutional challenge to the Major Crimes Act. Although subsequent scholarship has revealed that the crime did not actually take place on the reservation,³⁵ two Native men were nonetheless brought to trial for the murder of another Native man under the Major Crimes Act. In an astounding opinion that not only remains good law but is regularly cited for its central proposition, the Supreme Court ruled against the tribal members and upheld the constitutionality of the law.³⁶ Straining for constitutional authority for the federal law, lawyers for the United States argued in their brief before the Supreme Court that the Indian Commerce Clause³⁷ authorized the legislation because if Native peoples were allowed to kill one another, then there would be fewer with whom to engage in commerce.³⁸

Unsurprisingly, the Supreme Court rejected this argument, noting that “it would be a very strained construction”³⁹ of the Indian Commerce Clause. While this should have been the end of the analysis, Justice Samuel Freeman Miller continued:

“But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two.”⁴⁰

Reflecting on the often contentious relationship between

the states and tribal nations, and declaring that states are often the “deadliest enemies”⁴¹ of tribal nations, Miller concluded that the authority to enact the Major Crimes Act “must exist in [the federal] government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.”⁴² Still regularly cited, *United States v. Kagama* essentially stands for the proposition that congressional authority over Native peoples is unconstrained by the Constitution.

Although somewhat implicit, the opinion makes clear that Justice Miller, as well as many others involved at various levels of Indian affairs, had little to no regard for tribal methods and systems of justice. Stating that the power to punish tribal criminals must exist in the federal government “because it has never existed anywhere else,” and that the United States “alone can enforce its law on tribes,” evidenced a true indifference to the practices of tribal peoples, the methodologies that they employed, and the goals they sought to accomplish for their communities through their various dispute-resolution systems.

When tribal nations began developing their own Western-influenced courts during the twentieth century, Congress also began to take a greater interest. Responding to the perceived problem of tribal governmental abuses on reservations—at a point in American history when civil rights were a topic of considerable national discussion—Congress passed the Indian Civil Rights Act of 1968.⁴³ The Indian Civil Rights Act imposed a number of guarantees from the Bill of Rights upon tribal governments, while also seeking to balance those impositions with respect for tribal traditions and the severe economic difficulties that were facing tribal nations. For example, tribal nations are required to allow lawyers into their courts if those under its jurisdiction so request, but they are not required to provide counsel for indigent clients⁴⁴ (although many today do so⁴⁵). The Indian Civil Rights Act also limited the criminal punishments to which a tribal nation could sentence a defendant. Originally set at six months in jail and a \$500 fine, the statute was amended in 1986 to increase the penalties to one year and a \$5,000 fine. Tribal reaction to the Indian Civil Rights Act was mixed, with some arguing that it was fine in principle but that it was unnecessary, others arguing that it was an unwarranted intrusion into tribal sovereignty, and most arguing that the real threat to the civil rights of individuals on reservations was not from tribal governments but from the federal and state governments.⁴⁶

33. *Id.*

34. Major Crimes Act, 18 U.S.C. § 1153 (2006).

35. See Sidney L. Harring, *The Distorted History that Gave Rise to the “So Called” Plenary Power Doctrine: The Story of United States v. Kagama* in INDIAN LAW STORIES (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011).

36. *United States v. Kagama*, 118 U.S. 375 (1886).

37. U.S. CONST. art. I, § 8, cl. 3.

38. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 70-71 (1997).

39. *Kagama*, 118 U.S. at 378.

40. *Id.* at 379.

41. *Id.* at 384.

42. *Id.* at 384-85.

43. Indian Civil Rights Act, Pub. L. 90-284, §§ 201-03, 82 Stat. 73, 77-78 (1968) (codified at 25 U.S.C. §§ 1301-03); see also *supra* text accompanying note 6.

44. 25 U.S.C. § 1302(6) (2006).

45. For another example, the Indian Civil Rights Act does not contain an equivalent to the First Amendment establishment clause out of deference to the generally conflated nature of traditional tribal governance and religious beliefs. The Indian Civil Rights Act, however, does contain First Amendment protections for speech. *Id.* at § 1302(1).

46. GETCHES ET AL., *supra* note 1, at 380.

The Indian Civil Rights Act is undoubtedly a limitation on tribal governmental authority, at the very least akin to the way that the federal Constitution is a limitation on the authority of the federal government. Nonetheless, the Indian Civil Rights Act marked a divergence of paths between Congress and the Supreme Court. Beginning in the 1970s Congress began offering greater support to tribal courts in what has become termed the Self-Determination Era of federal policy.

Perhaps the greatest example of Congress's commitment to tribal courts and sovereignty over the last forty years has been the Indian Child Welfare Act of 1978.⁴⁷ The federal legislation allowed tribal courts to assume child-custody proceedings for children who are tribal members or who are eligible to become tribal members. Occasionally misunderstood in the media,⁴⁸ the Indian Child Welfare Act does not automatically divest non-Indian adoptive or foster parents of their children. Rather, it simply gives tribal courts the authority to make the determinations of the best interests of the child. Congress has also passed other legislation in the furtherance of tribal courts and justice in Indian Country⁴⁹ as well as other significant pieces of legislation to foster tribal self-governance in the Self-Determination Era. This includes the recently passed Tribal Law and Order Act.⁵⁰ Signed into law in 2010, the Tribal Law and Order Act extends the potential reach of tribal courts in a number of significant ways, including better training for tribal law enforcement, the capacity for stronger criminal sentencing for tribal courts in compliance with certain standards, and requirements for federal prosecutors to explain why they declined to prosecute crimes in Indian Country. Although it is too early to tell if the Tribal Law and Order Act is having its intended effect, it nonetheless holds much promise and is reflective of the general congressional policy toward tribal nations and their courts.

Yet, while Congress has moved since the 1970s to strengthen tribal courts and increase their jurisdiction, the Supreme Court has moved completely in the opposite direction. Beginning with *Oliphant v. Suquamish Indian Tribe*⁵¹ in 1978 and steadily continuing into the present day, the Supreme Court has adopted the practice of defining and limiting the scope of tribal-court jurisdiction, interjecting the judicial branch into the federal government's relationship with tribal nations in an unprecedented manner.

The Court in *Oliphant* decided that tribal nations did not have criminal jurisdiction over non-Natives because it was "inconsistent with their status."⁵² This watershed case marked

the moment when the Supreme Court began to make clear that it would hold what has become an ever-increasing role in defining the "status" of tribal nations. Certainly in contradistinction to, and perhaps in response to, Congress's increasing support for tribal nations and their courts, the Supreme Court has announced a number of cases that have limited the scope of tribal authority, particularly in respect to tribal jurisdiction.⁵³

The Supreme Court's divergent path from Congress and its increasing willingness to define the metes and bounds of tribal jurisdiction according to the eminently pliable standard of the "status" of tribal nations has, on principle, been deeply disconcerting to tribal nations and others concerned with tribal sovereignty. And yet, the level of tribal trepidation has only been compounded by the type of language that the justices often employ to describe tribal courts, much of which is not particularly discernible from the earlier nineteenth-century precedents that first engaged with tribal adjudication. In some cases, the Court has used the exact language of the cases from the nineteenth century. For example, then-Associate Justice William Rehnquist's opinion in *Oliphant* quoted extensively from Crow Dog—albeit carefully removing the more clearly racist portions of the excerpt, some of which can be seen earlier in this article—to essentially assert the proposition that since it was unfair to subject Indians to the white man's law nearly a century previous, it was conversely unfair to subject non-Indians to tribal law in the contemporary setting. One scholar writing about Rehnquist's opinion in *Oliphant* has stated that it, "unembarrassedly perpetuates [the] overarching principle of white racial supremacy"⁵⁴ found in nineteenth-century cases and that, "it does so through a particularly virulent mode of rights-destroying, jurispathic transmission."⁵⁵ The same scholar also notes that Rehnquist's opinion "cites, quotes, and relies upon racist nineteenth century beliefs and stereotypes to justify an expansive, rights-destroying, present-day interpretation of [tribal rights]."⁵⁶

Those without even a passing knowledge of Indian law might be able to compartmentalize the opinion in *Oliphant* as the likely last gasp of a dying attitude toward minorities during

Signed into law in 2010, the Tribal Law and Order Act extends the potential reach of tribal courts in a number of significant ways

47. Indian Child Welfare Act of 1978, Pub. L. 905-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-23).

48. Campbell Brown, *Commentary: Law Lets a Little Boy Down*, CNN.COM, Dec. 6, 2008, http://articles.cnn.com/2008-12-16/politics/campbell.brown.utah_1_indian-child-welfare-act-tribe-care?_s=PM:POLITICS.

49. The Indian Law Enforcement Reform Act of 1990, 25 U.S.C. §§ 2801-09 (2006); Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (2006); Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. §§ 2651-81 (2006).

50. Tribal Law and Order Act, Pub. L. No. 111-211, § 202 (a)(4)(A), 124 Stat. 2258, 2262 (2010) (codified at 25 U.S.C. §§ 2801-15

(2006).

51. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

52. *Id.* at 208.

53. See, e.g., *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316 (2008); *Nevada v. Hicks*, 533 U.S. 121 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Montana v. United States*, 450 U.S. 544 (1981).

54. ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 97 (2005).

55. *Id.*

56. *Id.* at 97-98.

a period of social change. However, those with even a cursory knowledge of Indian law (or of Rehnquist's tremendous influence over the Court for that matter) know better. The Supreme Court's seeming wariness, if not outright hostility, toward tribal courts has grown, and is little changed in terms of justifications from those of the nineteenth-century courts. For example, Associate Justice David Souter's concurrence in *Nevada v. Hicks*,⁵⁷ a case decided in 2001 that again limited the authority of tribal courts, was perhaps a little more telling than even he fully understood when he noted, "Limiting tribal-court civil jurisdiction . . . not only applies the animating principle behind our precedents, but *fits with historical assumptions about tribal authority*" ⁵⁸ (Emphasis added.) Souter also stated that it was important to know the boundaries of tribal court jurisdiction because tribal courts "differ from traditional American courts in a number of significant respects."⁵⁹ Conceding that many of the important guarantees in the Bill of Rights were applied to tribal nations through the Indian Civil Rights Act, Souter nonetheless noted, by quoting *Oliphant*, that tribal courts were able to define for themselves how to apply concepts such as due process and equal protection.⁶⁰ Souter also showed hesitance toward tribal common law, stating that "the resulting law applicable in tribal courts is a complex mix of tribal codes, and federal, state, and traditional law," which he claimed, "would be unusually difficult for an outsider to sort out."⁶¹

The clear implication of the totality of Souter's concurrence is that tribal courts, which are "different" from American courts, are unwilling or incapable of protecting the rights of individuals simply because they are tribal courts. The underlying presumption that tribal courts are incapable of being fair (and more specifically that tribal conceptions of due process and equal protection will inherently be lesser than their American counterparts) is perhaps unlikely to withstand any serious scrutiny and has already been called into serious question with respect to at least one prominent tribal court.⁶² Maybe more importantly, it shows little discernable difference from the assumptions made about tribal nations, peoples, and adjudicatory systems from over a hundred years ago. Unfortunately Justice Souter is not alone in his assumptions about tribal courts, as seemingly every decision concerning tribal-court jurisdiction since *Oliphant* evidences the type of skepticism of tribal courts that was not uncommon in the decisions of the Allotment Era over a hundred years ago.

CONCLUSION

The Supreme Court has not always been hostile to tribal court interests,⁶³ but it has generally only ruled in the favor of tribal courts when their proceedings concerned tribal members. Whenever non-Native interests have been at stake, the Supreme Court has shown little, if any, respect toward tribal courts. This disregard for tribal courts has changed little, if at

all, since the nineteenth century and has trickled down to the lower American courts.

This disregard is quite possibly the greatest obstacle that tribal courts have historically faced and face today. Constantly challenged by their American counterparts, tribal courts face the uphill battle of establishing their legitimacy. While there has been some movement, particularly on the state level,⁶⁴ to give some effect to tribal-court decisions and orders, a general hostility remains and is spearheaded by the Supreme Court. Despite the innovation of tribal courts and their ability to serve not only their own communities but the greater good as well, they have been consistently curtailed by the Supreme Court and state courts. While Congress has given greater sanction to tribal courts and their jurisdiction, the American judiciary has generally moved in the opposite direction. One of the driving forces behind this resistance is the same perspective about tribal nations and adjudicatory methods that existed in the 1880s.

The time has come for American judges to examine their own attitudes about tribal courts. Perhaps unreflectively, many American judges appear to assume the worst about tribal courts and are fearful of what they imagine tribal courts to be without truly examining them for what they are, perpetuating notions about tribal nations, governance, and judicial proceedings that are rooted in the nineteenth century. Like any human institution, tribal courts are capable of mistakes and abuses (not unlike the American political system itself). But the "on the ground" activities of tribal courts strongly suggest that they operate with at least the same level of fairness, thought, and balance as other American courts and that they are succeeding in the difficult task of functioning for those whose cases are before them under the types of stresses no other court system faces. By examining tribal courts and their decisions for what they are, and not for what they have been imagined to be for well over a hundred years, state and federal court judges could go a long way in establishing the legitimacy of their tribal brethren and solving the continuing problems of law enforcement in Indian Country.



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57. 553 U.S. 353 (2001).

58. *Id.* at 382.

59. *Id.* at 383.

60. *Id.* at 383-84.

61. *Id.* at 384-85.

62. See Bethany R. Berger, *Justice and the Outsider: Jurisdiction over*

Nonmembers in Tribal Legal Systems, 37 ARIZ. ST. L. J. 1047 (2005).

63. See *Talton v. Mayes*, 163 U.S. 376 (1896); *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978); *Natl'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845.

64. See MINN. GEN. R. PRAC. 10.01 and 10.02

Knowing the Communities We Serve

Liana Fiol Matta

When courts and poor communities interact, they sometimes seem to move on different planes and speak different languages. The reality is that most judges are alienated from poor communities. We don't understand their problems, their needs, and their aspirations, because we don't generally have a background in poverty, whether personal or professional. But we are, after all, public servants and, as such, we must transcend this alienation and truly get to know the communities we serve.

This, however, is not an easy task, because these communities are not all the same nor do they have the same problems, characteristics, and ideals. In fact, the idea of the inclusive community, the supposedly homogeneous society whose common good was the law's goal and whose moral consensus was the content of the law, has been shown for the myth it is and always was. I think we have always known, but failed to acknowledge, that we live in myriad groups, whose members are united by common interests, sympathies, objectives, and, very often, by common struggles. These groups may be based on professional interests, and thus be more or less cohesive; they may be temporary, for instance, groups of students at a college or university; or they may respond to deep, life-conditioning and historical reasons, such as race, ethnicity, culture, sexual preference, or poverty. When these profound conditions are present, the bonds are not temporary nor are they taken lightly, and what we have is a true community. Society is, in effect, a cluster of different communities.¹

I. THE CONCEPT OF COMMUNITY

What really makes a "community"? Our social interactions are often not as one-on-one as we think: each of us interacts with the other from the perspective—and according to the paradigms—of a specific group. This is all complicated, of course, by the fact that we go in and out of different groups throughout our lives. For example, some of us live in big cities but were born in small towns. We have all been students at one

time; maybe we've also practiced a different profession before becoming lawyers—I have taught law students who were architects, engineers, and medical doctors. However, not all groups necessarily form communities.

The bonds that form a community are nurtured by a sense of collective commitment and a common identity.² Communities, however diverse their members, are shaped by their collective struggles to solve common challenges that often threaten their spatial integrity and cultural traits.³ Poor communities may be composed of different individuals with distinct attitudes and lifestyles; varying in age, wealth, education, and social concerns, they may be part of other groups, but, as a cluster of human beings, they respond as a whole to certain cultural, economic, and historical events. Poverty implies social and economic inequality regarding, primarily, the possession of property and the exercise of political influence. It includes the acceptance of a relationship of dependence that is not necessarily an individual experience; instead, inequality and economic dependence in poor communities is a common condition experienced collectively.⁴

II. FACING COMMUNITIES' ECONOMIC CHALLENGES

Throughout the years, we have slowly come to realize that sectors of society that control economic development have historically viewed poor communities as an obstacle to financial growth. In Puerto Rico, the thrust toward continuous financial and economic expansion is coupled with an incessant territorial invasion that has gradually shaken and torn apart poor communities. Gentrification has increased significantly in the last two decades—ironically, at the same time that more people, including poor people, dream of equal access to an economic utopia.⁵

Today, hundreds of thousands of Puerto Ricans live under conditions of poverty, without basic infrastructure, under difficult environmental conditions and with deficient housing. We are also experiencing extremely high levels of domestic

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Footnotes

1. See Huntington Cairns, *The Community as the Legal Order*, in COMMUNITY 25-49 (Carl J. Friedrich ed., 1959); Stuart M. Brown, *The Community as the Legal Order Reviewed*, in COMMUNITY, *supra*, at 38-49.
2. See George E. Gordon Catlin, *The Meaning of Community*, in COMMUNITY, *supra* note 1, at 114-134.
3. See Talcott Parsons, *The Principal Structure of Community: A Sociological View*, in COMMUNITY, *supra* note 1, at 152-179; John

Ladd, *The Concept of Community: A Logical Analysis*, in COMMUNITY, *supra* note 1, at 269-293.

4. Linda Colón Reyes, past director of the Puerto Rico Special Communities Project, Address at the Judicial Academy of Puerto Rico (Academia Judicial Puertorriqueña): La pobreza y la desigualdad social contemporánea (Poverty and Contemporary Social Inequalities) (August 28, 2008).
5. *Id.* The same situation is seen in cities throughout the United States. See, e.g., Robert J. Sampson, *Racial Stratification and the Durable Tangle of Neighborhood Inequality*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 260 (2009); Parag Khandhar, *Where the Streets Have Many Names: Zoning, Community Power, and the Future of Shaw*, Washington D.C., 2 AM. U. MODERN AM. 25, 25-28 (2006).

violence, teenage pregnancy, and drug abuse, as well as an appalling crime rate, to which disadvantaged communities are particularly vulnerable.⁶

In 2006, a research group found that, even though wages had shown a slight improvement since the start of the decade, almost 40% of Puerto Rican families had earnings of less than \$15,000 per year.⁷ Recently, the United States Census Bureau published that in 2010, the average income of families that receive wages in Puerto Rico was \$19,730. At that time, 45% of the population lived below the poverty level, according to federal standards. In 2011, the median income diminished to \$18,660 and the percentage of people living below the poverty level in Puerto Rico rose to 45.6%.⁸ The current worldwide economic recession has had a direct effect on our population, leaving thousands homeless and without jobs.⁹ Yet even as this economic crisis increases the percentage of families living under conditions of poverty, their struggle is also strengthening their sense of community and solidarity.¹⁰

In our more marginalized communities, neighbors are not just “individuals living in physical proximity.”¹¹ In these communities, people become indispensable to one another as small links in a wide support network essential for daily life. On many occasions, this social arrangement turns out to be as crucial for people’s survival, or even more so, than the family. Neighbors fulfill important roles as caretakers for children and the elderly, assist in house chores, and provide food and other important supplies during emergencies and natural disasters.

Therefore, when economic expansion and particular interests have threatened to tear apart poor communities, to erase their support networks, and to lessen their quality of life by affecting the environment and their surroundings, the communities have raised their voices, demanding equality and protection not just from the State but, more significantly, from the law and the courts.

III. GOVERNMENT STRATEGIES AND THE COMMUNITY-RIGHTS MOVEMENT

A strong community-rights movement is not a recent phenomenon in Puerto Rico. During the 1940s, government reforms were focused on a weakened agrarian economy that depended, basically, on the sugar industry. This dependence on one crop rendered the country vulnerable to changes in the market. Thus, during this period and into the 1960s, the government focused its attention not just on agricultural reform but on attaining a higher level of industrialization. A key to this industrialization program’s success was the migration to the United States of agricultural workers whose jobs were being lost or replaced. Some were truly migrant workers and returned periodically to Puerto Rico.¹² Others stayed and became the parents and grandparents of most of the Puerto Ricans currently living in the United States, who, according to the census data, outnumber the population of Puerto Rico today.¹³

In Puerto Rico, the immediate consequence of these government programs of the 1940s, 1950s, and 1960s was an increase in migration from rural to urban areas, where people settled in shantytowns. To prevent further growth of this informal housing movement, the government did not allow citizens to repair homes located in these areas. In spite of these restrictions, the growing urban population took over wetlands near mangroves. As a result, these communities were not only living on the peripheries of planned urban development, but were also unsanitary, lacking basic utilities such as water, electricity, and drainage systems, and were susceptible to flooding.¹⁴

To deal with this situation, the government of Puerto Rico developed a new strategy, a public urban-housing program

A strong community-rights movement is not a recent phenomenon in Puerto Rico.

6. Statement of Motives, Special Communities Act (Ley para el Desarrollo Integral de las Comunidades Especiales de Puerto Rico), Law No. 1-2001 (amended), P.R. Laws Ann. tit. 21, §§ 962-973f (Supp. 2012).

7. Colón Reyes, *supra* note 4, referring to the findings of a 2006 study called Puerto Rico Community Survey (Encuesta de la Comunidad de Puerto Rico).

8. U.S. Census Bureau, www.census.gov. See also CB Online, *Census: PR Poverty Up, Income Down*, CARIBBEAN BUSINESS, September 23, 2012, <http://caribbeanbusinesspr.com/news/census-pr-poverty-up-income-down-76580.html>. The Puerto Rico Center for the New Economy (Centro para la Nueva Economía) has warned that income inequality has increased: the poorest 20% of Puerto Ricans received only 1.7% of the total income in 2011 while the richest 20% received the 55.3%. See <http://grupocne.org> (last visited Sept. 29, 2012).

9. A 1999 study on the poverty rate among Puerto Rican families found that 46.3% had earnings of less than \$15,000 dollars per year. The study also showed that more than 50% of the families in 62.8% of the 78 municipalities had earnings of less than \$15,000. See also profiles of poor families in Puerto Rico prepared by Puerto Rico Legal Services Office and Office for Economic Opportunity

of Puerto Rico: Servicios Legales de Puerto Rico, *Perfil de las familias pobres de Puerto Rico* (1980); Oficina de Oportunidad Económica de Puerto Rico, *Perfiles de la pobreza en Puerto Rico* (1976).

10. Colón Reyes, *supra* note 4; LINDA COLÓN REYES, *POBREZA EN PUERTO RICO: RADIOGRAFÍA DEL PROYECTO AMERICANO* (2006).

11. Colón Reyes, *supra* note 4.

12. LILIANA COTTO MORALES, *DESALAMBRAR: ORÍGENES DE LOS RESCATES DE TERRENOS EN PUERTO RICO Y SU PERTINENCIA EN LOS MOVIMIENTOS SOCIALES CONTEMPORÁNEOS* 27 (2006).

13. According to the United States Census Bureau, in 2010, the population of Puerto Rico was 3.725 million while the number of Puerto Ricans living in the United States was 4.6 million, which represented 9% of the Hispanic population. See U.S. Census Bureau, *2010 Puerto Rico Results*, http://2010.census.gov/news/pdf/cb11cn120_pr_totalpop_2010map.pdf; *The Hispanic Population: 2010 Census Briefs* 2, May 2011, <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

14. COTTO MORALES, *supra* note 12. They also contributed to the loss of mangroves that began in the 19th century as a result of the Spanish government’s policy of drying out mangroves.

In this process, the citizens will probably look for relief in the courts. Are we, as judges, ready to assist them?

consisting of apartment buildings called *caseríos*, which were similar to the public-housing projects in the United States. However, many residents of poor communities refused to move to these new apartment complexes because they realized that, by doing so, they would lose their property rights and would be made tenants of

the State.¹⁵ As a result, the government decided to change strategies once again, removed previous restrictions on informal housing developments, and allowed home renovations, with cement and more durable materials.¹⁶

The new economic strategy based on industrialization resulted in a significant increase in the per capita income and consuming capacity of the general population.¹⁷ But these social benefits were not evenly distributed. Poverty and unemployment were not eradicated by these programs, and the government's strategy completely lost its effectiveness by the 1970s. During this decade, Puerto Rican workers started to demand better salaries, and American manufacturing industries started to relocate in Taiwan and Singapore in search of greater economic and tax incentives and a cheaper workforce. This contributed significantly to high unemployment rates and social unrest. In response to this economic upheaval, a new phase of government assistance began in 1975, as massive transfers of federal funds, by virtue of the Food Stamp Program, were awarded to Puerto Rico. At the time, 60% of Puerto Rican families qualified for assistance. The result was an increased tendency toward economic and social dependence.¹⁸ Also, in 1976, the United States Congress extended section 936 of the Internal Revenue Code as a means of encouraging economic activity on the Island. This tax exemption lasted until 1996.

During the 1980s and well into the year 2000, both the government and the private sector in Puerto Rico started an aggressive housing-construction program. However, many families could not afford to buy these new houses, and a new wave of low-income families began taking over public and

privately owned vacant lands.¹⁹ There they created new communities. This new movement generated intense social battles between the land-owning sectors and the emerging communities. Marginalized groups began to organize and engage in social activism; they took legal actions in the courts and formed community organizations, with the assistance of political parties, social workers, intellectuals, and religious leaders.

Many citizens, as well as various political leaders, perceived these families as squatters and these community actions as "land invasions." On the other hand, members of these communities saw themselves as "land rescuers."²⁰ Eventually, private-property owners and the government filed for eviction of these newly formed communities, with some eviction proceedings ending in chaos, violence, and even the deaths of those who refused to leave.²¹

Today, as the population continues to grow, cities are expanding beyond their traditional limits. Unplanned urbanization is straining the cities' capacity for providing basic necessities like potable water, waste and garbage disposal, electricity, roads, and bridges. Environmental conditions in many communities are extremely difficult; some communities are in danger of vanishing as the result of natural disasters, like floods and landslides, or manmade disasters.²² Urban sprawl presents another challenge for communities that were established years ago in what were then rural areas surrounding the urban centers. Eighty or ninety years later, these communities are now surrounded by wealthy neighborhoods. Some of these communities hold land titles to valuable real estate that is ripe for development. We are on the eve of a new wave of gentrification that will expose lower-income communities once again to the threat of eviction or the exercise by the government of its power of eminent domain. In this process, the citizens will probably look for relief in the courts. Are we, as judges, ready to assist them?

IV. DELIVERING JUSTICE TO THE COMMUNITIES: THE ROLE OF THE COURTS

Disadvantaged communities are entitled to justice in their living conditions, health, education, and job opportunities. They are also entitled to respect and support of their identity

15. *Id.* at 28.

16. *Id.* at 29.

17. See RAFAEL PICÓ, *EL DESARROLLO DE LA COMUNIDAD: LA EXPERIENCIA EN PUERTO RICO* 4-17 (1966).

18. Linda Colón Reyes, *Neoliberalismo, globalización y pobreza en Puerto Rico*, in *ENSAYOS SOBRE LA POBREZA EN PUERTO RICO* 28 (Francisco Catalá & Francisco Martínez eds., 2002).

19. *Id.* at 29-33.

20. Our translation for the phrase "*rescatadores de terrenos*." See Érika Fontáñez Torres, *La presencia del Derecho en el movimiento de rescates de terreno en Puerto Rico: rescatando entre leyes, tribunales y el discurso legal*, 68 REV. COL. ABOG. PR 351 (2007); COTTO MORALES, *supra* note 12.

21. See COTTO MORALES, *supra* note 13, at 38-108. See also Érika Fontáñez Torres, *La política jurídica de la propiedad en Puerto Rico: un abordaje crítico feminista en busca de igualdad y equidad para las*

mujeres, 79 REV. JUR. U.P.R. 915, 920-44 (2010).

22. Faulty or nonexistent urban planning has provoked catastrophes like the Mameyes mudslide in October 1985, which destroyed the Mameyes shantytown in the city of Ponce and killed more than a hundred people. Another community was extinguished in 1985, when residents of Ciudad Cristiana, a housing development established five years earlier in the municipality of Humacao, had to be evacuated because of their proximity to a canal that had been used to discharge industrial waste for thirteen years. Also, in 2009, the Caribbean Petroleum Corporation (CAPECO) petroleum depot, located between the cities of Cataño and Bayamón, exploded, affecting residential areas nearby. Furthermore, the residents of the island of Vieques off the east coast of Puerto Rico are still waiting for the lands near their houses to be uncontaminated after decades of being used as a bombing range by the United States' Navy.

as communities. How can the courts contribute toward this end? Perhaps our first question should be what conditions have to be in place before the courts can play a significant part in the solution of these problems. The first condition, as I see it, is required by the limits imposed by law and tradition on the role of the courts in our society, which frowns on the formulation of public policy by courts. I would state this condition more as something that is to be desired but is not always in place: a clearly legislated policy concerning the rights of these communities.

The Special Communities Act of Puerto Rico, approved in 2001, is one such statement.²³ Dubbing communities that are underprivileged in terms of poverty and other criteria as “special,” this act adopts a policy of empowerment for their residents. The Act was amended in 2004 to require, among other safeguards, the consent of 75% of the members of a “special community” before the government can exercise its power of eminent domain.²⁴

Another important act, approved in 2004, created a land trust in San Juan modeled after the Dudley Street Initiative in Boston: the Martín Peña Canal Land Trust (Fideicomiso de la Tierra del Caño Martín Peña).²⁵ To fend-off land speculation and assure the permanence of the people living on the lands along the Martín Peña Canal, the titles to government lands in that area were transmitted to the trust, which was also authorized to receive title to private lands along the canal that were voluntarily transferred by the owners. The Act was adopted in response to the requests of eight communities organized as the G-8 group since 2002 to represent the interests of 26,000 persons who lived on both sides of a canal that joins the San Juan and San José Bays in Puerto Rico’s capital city. These tracts of land were created by decades of sinking dirt, garbage, and debris into swampland until they were firm enough to support modest houses.²⁶

A clear and firm legislative statement of public policy, unfortunately, is not always enough. Political changes often introduce contradictory visions. This happened to the Martín Peña Canal Act, which was amended in 2009 to revert property titles back to the original owners, the Puerto Rican Government and the City of San Juan.²⁷ The land trust sued on the basis of illegal taking of property and illegal encroachment on private contractual rights. The United States Court for the District of Puerto Rico abstained under the Pullman Abstention doctrine and dismissed the case.²⁸ The land trust appealed. At first, the Court of Appeals for the First Circuit in Boston stayed the implementation of the 2009 amendment, but then, in April 2010, it dismissed with prejudice all the federal claims while dismissing without prejudice the claims under Puerto Rican law.²⁹

The Martín Peña Canal Act was amended again in 2011, to authorize the government to confer individual property titles to these lands.³⁰ This, of course, weakened the original purpose of the land-trust act, which was to forestall speculation and maintain these properties for residential use by the G-8 families and their descendants. Nevertheless, another change of administration as a result of the 2012 elections is expected to bring back the original public policy. The newly elected mayor of San Juan has declared that, within her first 100 hours in office, she will take legal action to stop the granting of individual property titles in the eight communities and promote

Perhaps our first question should be what conditions have to be in place before the courts can play a significant part in the solution of these problems.

23. Special Communities Act (Ley para el Desarrollo Integral de las Comunidades Especiales de Puerto Rico), P.R. Laws Ann. tit. 21, §§ 962-973f (Supp. 2012). Although this law has not suffered important amendments, the project has experienced a dramatic reduction of funds and loss of resources.

24. Law No. 232-2004, P.R. Laws Ann. tit. 21, § 963(e) (Supp. 2012).

25. Statement of Motives, Act for the Integral Development of the Martín Peña Canal District (Ley para el Desarrollo Integral del Distrito de Planificación Especial del Caño de Martín Peña), Law No. 489-2004 (amended), P.R. Laws Ann. tit. 23, §§ 5031-5065 (Supp. 2012).

26. After ten years of fighting, the G-8 group has gained some victories but is still waiting for the dredging of the Martín Peña Canal to improve living conditions and development. See Libni Sanjurjo, *Prisioneros de aguas sucias*, PRIMERA HORA, September 6, 2012, at 38-39; Michelle Estrada, *El Caño celebra 10 años de autogestión*, EL NUEVO DÍA, October 27, 2012, at 20.

27. Law No. 32-2009, P.R. Laws Ann. tit. 23, § 5045 (Supp. 2012). The amendment responded to a change of policy when the administration changed after the 2008 elections.

28. Fideicomiso de la Tierra del Caño Martín Peña v. Fortuño *et al.*, 670 F. Supp. 2d 132 (D.P.R. 2009).

29. Fideicomiso de la Tierra del Caño Martín Peña v. Fortuño *et al.*,

604 F.3d 7 (1st Cir. 2008), available at <http://www.ca1.uscourts.gov/pdf/opinions/09-2569P-01A.pdf>. The court stated that:

Law 32, by its terms, revokes the transfer of public agencies’ lands to the Fideicomiso and returns the lands to public ownership through agencies of the Commonwealth and the Municipality. This transfer to public ownership reflects the Commonwealth’s judgment that the goals of rehabilitating and revitalizing the canal will be better served, and will be consistent with other missions of its public agencies, if these agencies, rather than the Fideicomiso and the [Martín Peña ENLACE Project] Corporation, again hold and administer the lands in the canal area they once owned. There can be no doubt that Law 32’s transfer to public ownership is for “public use” under the Takings Clause. *Id.* at 18-19.

The ENLACE Project Corporation was created by Law 489 to help the residents in the rehabilitation of the area and establish community development programs. It works together with the G-8 group.

30. Law No. 70-2011, P.R. Laws Ann. tit. 23, § 5045 (Supp. 2012). This amendment also established limits to the possibility of resale by requiring the new owners to pay certain sums if the properties are sold within a period of 10 years after the transfer.

Many circumstances, external to the courts, can limit access to justice—among them, the type of legal education . . . and the commercialization of the legal profession.

to prevent the violation of rights, to secure legal remedies, and to resolve controversies.³² Many circumstances, external to the courts, can limit access to justice—among them, the type of legal education provided by law schools and the commercialization of the legal profession.

LEGAL EDUCATION

In general, our law schools teach positive law: the law that is, not necessarily the law that should be. And the analytical skills typical of lawyering are developed mostly to understand and apply the law as it is and not necessarily as it could or should be. Most professors do not include sociological discussions of the law in their analysis. Duncan Kennedy said it best: “[T]he trouble with the legal system is that it fails to put the state behind the rights of the oppressed, or that the system fails to enforce the rights formally recognized. If one thinks about law this way, one is inescapably dependent on the very techniques of legal reasoning that are being marshaled in defense of the status quo.”³³ In his words, the conservative approach taught in law schools is “willfully blind to substantive inequality.”³⁴

the amendment of Law 489 to reinforce the Martín Peña Canal Land Trust.³¹

So our first condition for the role of courts in protecting communities—a clearly legislated policy—is not always met. The question of the role of the courts is then best posed in terms of “access to justice.” In other words, are poor communities really able to make their case in our courts? Access to justice has been defined as the set of conditions that facilitate or hinder the equal use of established procedural mechanisms

ity.”³⁴ This willful blindness allows or justifies the eagerness of legal practitioners to defend those who can afford legal representation and ignores the communities’ need for legal assistance. In that sense, justice has a price: the cost of legal representation.³⁵

THE COST OF LEGAL SERVICES

The high cost of legal representation is a significant hindrance to justice. According to Deborah L. Rhode, millions of Americans lack access to justice, let alone equal access. In civil proceedings, most low- and middle-income citizens do not have any affordable access to legal services, while in the criminal justice system, government-funded services for the indigent accused are evidently inadequate. Rhode states that about “four-fifths of the civil legal needs of the poor, and two to three-fifths of the needs of the middle-income individuals, remain unmet.”³⁶ As she indicates, “Only one lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income Americans.”³⁷

In Puerto Rico, several organizations provide legal representation to the indigent, both in criminal and civil cases, and law-school students can participate in legal clinics that represent low-income clients.³⁸ Nevertheless, as professor Russell G. Pearce states, these initiatives by themselves have a very limited impact in advancing equal justice since they address “only a small portion of the inequality within the legal system and do not recognize that our society cannot provide the vast resources necessary to equalize the access to justice for low-income people.”³⁹

QUALITY OF LEGAL SERVICES

Costs have implications not only on the availability but on the quality of legal representation for poor communities.⁴⁰ The American judiciary system, within which Puerto Rico operates, is based on an adversary system that assumes that the parties’ pursuit of their individual interests results in an outcome that

31. Gerardo E. Alvarado León, *Cruz auditará las finanzas de la capital*, EL NUEVO DÍA, November 12, 2012, at 8; Antonio R. Gómez, *Carmen Yulín se compromete con el Caño Martín Peña y el grupo G-8*, PRIMERA HORA, November 1, 2012, available at: <http://www.primerahora.com/carmenyulinsecomprometeconelcanomartinpenayelgrupog8-717938.html>. The new mayor will take office in January, 2013.

32. Efrén Rivera Ramos, *Las múltiples caras del acceso a la justicia* (The Many Faces of Access to Justice), in PRIMER CONGRESO ACCESO A LA JUSTICIA (XXII CONFERENCIA JUDICIAL, 2 Y 3 DE MAYO DE 2002) 8 (2005).

33. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 61-62 (David Kairys ed., 1998), available at http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy_Politics%20of%20Law.pdf.

34. *Id.* at 62. See generally DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION (2004).

35. Rivera Ramos, *supra* note 32, at 13.

36. DEBORAH L. RHODE, ACCESS TO JUSTICE 47 (2004), cited in Russell G.

Pearce, *Redressing Inequality in the Market of Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 973 (2004).

37. Deborah L. Rhode, *The Social Responsibility of Lawyers: Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL’Y 47, 47-48 (2003).

38. For example, the Puerto Rico Legal Services Corporation (Corporación de Servicios Legales de Puerto Rico) assists the poor in civil proceedings, while the Legal Assistance Society (Sociedad para la Asistencia Legal) represents the indigent in criminal cases in Puerto Rico. The Civil Action and Education Corporation (Corporación de Acción Civil y Educación), which provided legal assistance in civil cases to people in prisons since 1996, had to cease operations in July 2011 due to lack of funding. See Rama Judicial de Puerto Rico, Servicios Legales Gratuitos, <http://www.ramajudicial.pr/servicios/servicioslegales.htm>.

39. Pearce, *supra* note 36, at 970.

40. The First Canon of the Puerto Rico Legal Ethics Code states: “[T]he lawyer shall accept and carry out every reasonable assignment requiring free legal services to indigents The lack of monetary compensation in those cases does not exempt lawyers

is fair, for them and for society as a whole. As a result, the parties control the major aspects of a case, such as determining the issues to be solved and the evidence to be presented. In such a system, the quality of the lawyers' work "undoubtedly has a major influence on the outcome."⁴¹

Unfortunately, there is an undeniable correlation between the cost and the quality of available legal services. For this reason, it has been said that "our legal system largely distributes legal services through the market and justice through an adversary system where the quality of legal services has a major influence. As a result, to a significant degree, justice is bought and sold and the inevitable result is unequal justice under the law."⁴²

COMPLEXITY OF ISSUES

The complexities of legal controversies involving poor communities make it even harder for them to receive adequate legal representation. Many communities are socially diverse in terms of things like race, jobs or unemployment, level of education, health, age, and family structure. This means that their members, while united with respect to certain issues, are not necessarily so with respect to many others. Also, sustaining a community effort requires participation, and not all of the members participate in meetings and working groups. It is often very difficult to achieve consensus among community members regarding legal actions; communication between lawyers and their multiple clients can be difficult, and many members of the community may grow tired of waiting for a case to end and may refuse to support the community action. Numerous community litigations involve intricate issues and require extensive discovery, expert reports and testimony, and on-site inspections, all of which are expensive and complicated.

Even if the community obtains the necessary funds to start a legal action, in many cases the long process drains its limited economic capacity, thus forcing a settlement or a withdrawal without achieving the desired result. Likewise, a restricted budget can limit access to complete and crucial information regarding the judicial system and alternatives available to assert civil rights. Community members often do not understand the judicial process or have inadequate access to information, and this affects their willingness to participate.

V. ACCESS TO JUSTICE AND THE JUDGES

What does all this mean to the individual judge in whose

courtroom this real-life drama is often played? Acquiring a law degree and fulfilling the minimum requirements for serving as a judge does not guarantee that the person seated at the bench fully comprehends the needs of our impoverished communities and his or her responsibility toward the members of these communities. The scenario I have very broadly described forces us to do our utmost as judges to understand these communities and redefine our role in the daily process of delivering justice. Along the way, we must reject abstract neutrality and acquire a different kind of objectivity, assume our role as guardians of procedural fairness, and learn to value the feelings and ideas of others, even those who seem most different from ourselves.

THE QUEST FOR REASONABLE OBJECTIVITY

Under the Constitution, the primary function of a judge is to guarantee the fundamental constitutional rights of every person. This duty is based on the conviction that judges, as citizens who are aware of the value of these rights in a democratic society, choose their profession knowingly, and they willingly assume responsibility for protecting those rights. They are committed to this end, and part of this commitment is to be aware of the great adversities faced by communities that have limited access to the courts, whose members hope to find a helping hand among legal professionals and many times are forced to go to court without legal assistance, in a desperate effort to be heard.

The traditional ideal of the "objective judge" does not help us in this process. Complete objectivity and neutrality have been shown to be unattainable ends. Judges, as human beings, are the sum of their own diverse experiences, ideas, situations, expectations, and realities. Therefore, when a judge neglects to recognize her own subjectivity, her judgments will be inevitably biased. We must become aware of our own subjectivities, ideologies, and paradigms.⁴³ By doing so, we may

[W]e must reject abstract neutrality and acquire a different kind of objectivity, assume our role as guardians of procedural fairness, and learn to value the feelings and ideas of others

from the obligation to always provide competent, diligent, and enthusiastic legal services." Rama Judicial de Puerto Rico, Canon 1, Cánones de Ética Profesional, <http://www.ramajudicial.pr/leyes/imp-canones-etica-profesional.html>. Even though lawyers have to provide the same quality of legal assistance when they work pro bono, many pro bono cases do not receive adequate representation, often resulting in their dismissal.

41. Pearce, *supra* note 36, at 971, citing JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 1-2, 8-9 (2003); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283 (1976).

42. Pearce, *supra* note 36, at 970.

43. "[T]hese forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167-168 (1937). See RONALD DWORKIN, LAW'S EMPIRE, 73-86 (1986).

Procedural fairness is essential, but the perception of procedural fairness is equally important.

be able to exercise our judgment more effectively and move closer to a truly impartial assessment of events. Our goal, then, is not neutrality but a reasonable objectivity.

GUARDIANS OF PROCEDURAL FAIRNESS

Judges must go beyond the idea that they are umpires in a contest between equal parties. They must be involved in the process to prevent

the abusive use of procedures, especially in those cases where one party clearly possesses more resources than the other to pay for legal expenses. In this type of case, lawyers representing high-income parties can bog down the process with motions and petitions, while the lawyers representing poor communities most often cannot afford adequate discovery, expert advice, or the time and human resources needed to confront these strategies. In these situations, judges must intervene to guarantee that both parties enjoy equal opportunities to ensure a just outcome.

The responsibility of presiding over a fair proceeding entails not only being aware of what occurs during the trial but also the outcomes produced by settlements, which are the most common results of lawsuits brought by or against disadvantaged communities.⁴⁴ As for self-represented or *pro se* parties, judges should be responsible for ensuring that they have the greatest possible opportunity to be heard.⁴⁵ Professor Russell Engler suggests that in those cases, judges should be responsible for developing a full and fair record, as well as providing assistance to the unrepresented litigants on matters of procedure, evidence, and questions of law.⁴⁶ This may include explaining the proceedings at every step and assuring that the parties understand these instructions and explanations. Judges may also refer a self-represented party to a self-help center or other similar services for advice.⁴⁷

An important study done by the American Judges Association, called *Procedural Fairness: A Key Ingredient in Public Satisfaction*, establishes that “[j]udges can alleviate much of the public dissatisfaction with the Judicial Branch by paying critical attention to the key elements of procedural fairness: voice, neutrality, respectful treatment, and engendering trust in authorities. Judges must be aware of the dissonance that exists between how they view the legal process and how the public before them views it.”⁴⁸ This means that judges should not only try to create fair outcomes, “they should also tailor their

actions, language, and responses to the public’s expectations of procedural fairness.”⁴⁹ Procedural fairness is essential, but the perception of procedural fairness is equally important. For this reason, a fair process often requires a judge who can explain the trial, in understandable language, to litigants, witnesses, and jurors. Judges need to accept that it is their responsibility to ensure that people comprehend the legal process, the court’s orders, and generally what is happening in their cases.⁵⁰

EMPATHY: VALUING THE OTHER’S FEELINGS AND IDEAS

Empathy was once a strange word, at least in traditional legal venues. Lawyers, and particularly judges, aren’t supposed to empathize; our tool is the rule of law, and that is as abstract and impersonal as it gets. If we are to transcend this neutrality-abstraction ideal that is force-fed to us in law school, judges must get to know the communities that seek redress in the courts. It is important to acquire a balanced perspective that provides hope of justice to the communities and deepens trust between the communities and the judiciary. An essential aspect of this process is learning to be better listeners.⁵¹ Really listening will help us identify those things that color our impartiality, and it will help us recognize our subjectivities, improve our patience, and strengthen our judicial temperament.

To ensure equal access to justice, we must democratize our perception of the way our society really is. We’ve come a long way from adhering to the formal notion of equality developed when the idea of “being free and equal under the law” had at its center a certain type of individual: masculine, white, heterosexual, belonging to the middle or high socioeconomic class. We know the detrimental effects that these concepts of equality have on marginalized groups. In the end, justice depends on our capacity to see and feel with the silently excluded and the socially invisible.

VI. ACCESS TO JUSTICE: JUDICIAL BRANCH INITIATIVES

JUDICIAL EDUCATION

Continuing education and professional development is essential in this process. The Judicial Academy of Puerto Rico, created in 2003, has developed some innovative judicial-education opportunities to help judges meet this challenge. Some are aimed at new judges and are mandatory. Others are optional opportunities for personal and professional growth in the adjudication of community problems.

Relevant topics for new judges, both at the lower and appellate levels, include management of sexual harassment, domes-

44. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2011-26 (1999).

45. Pearce, *supra* note 36, at 976, citing Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 *GEO. J. LEGAL ETHICS* 423, 442 (2004).

46. Engler, *supra* note 44, at 2028-30, 2059-63. Engler draws on precedents established in small-claims courts and administrative social-

security proceedings.

47. *Id.* at 2022-27.

48. Judge Kevin Burke & Judge Steven Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction: A White Paper of the American Judges Association* 3 (2007), available at <http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf>.

49. *Id.*

50. *Id.* at 17, 20.

51. *Id.*

tic violence, environmental law, and employment-discrimination cases. Other entry-level topics are: *Communication in the Courtroom*; *Control of the Courtroom*; *Judicial Temperament*; *Dealing with Stress*; and *Effective Decision-Making*. All of these are aimed at fostering an attitude of sensitivity to the situations judges must deal with in the courtroom daily. Also available to judges at our Judicial Academy are a course on *Therapeutic Jurisprudence*, a multidisciplinary look at the history and sociology—as well as legal aspects—of Puerto Rican prisons, and a course on immigration in Puerto Rico. Most importantly, there is a multi-course curriculum focused on access to justice, which discusses topics such as *Growing Old in Puerto Rico*, *Law and Poverty*, and *Discrimination Against Vulnerable Groups*.⁵²

Additionally, every semester our Judicial Academy offers our judges the opportunity to develop empathy and understanding by listening to what the more vulnerable groups of society have to say. For instance, in a course titled *Law and Poverty*, judges have met with members of the Coalition of Community Leaders and with lawyers who provide assistance to the communities, as well as law and sociology professors and heads of several government programs. They have also met with homeless people and community organizations that work with them.

Community leaders have spoken quite frankly about their perception of justice and the judicial system; they have explained why they perceive judges, lawyers, and some court personnel as distant, arrogant, and uncaring about the plight of the communities. They have addressed the need for judges to understand about collective or group rights, such as the right to the integral development of a community and the right of a community to manage its own development, under the Special Communities Act of 2001. They have spoken about the lack of knowledge, and even disdain, that some judges show toward the culture and lifestyles of marginalized communities, and they have discussed why community members do not feel welcomed in the spaces inhabited by judges. These are eye-opening conversations which consistently receive the highest evaluations from participating judges.

JUDICIAL BRANCH INITIATIVES

Of course, there is more to the administration of justice than what goes on in the courtroom. The Judicial Branch as a whole faces great challenges in the years ahead. A study submitted to the Supreme Court of Puerto Rico in 2000 recognized that in the future, courts will face increased litigation, a more diverse clientele, and new issues relating to economic development, as well as intensified awareness of environmental issues. The courts will have to deal with the implications of technological advances and demographic changes in our society, caused not

only by the continuing movement of the rural population to the cities but also by increased immigration into Puerto Rico, particularly from the Dominican Republic. This will result in a more diverse Puerto Rican society where racial and ethnic differences, a topic which has still not been dealt with too clearly in

Puerto Rico, will become more pertinent. An aging population, coupled with worrying numbers of young professionals settling in the United States, will bring new issues to the courts not only concerning age and gender discrimination but also health and welfare services and the right to die with dignity. Unfortunately, the study also foresees that the gap between the rich and the poor will continue to grow. Moreover, people will turn more and more to the judicial system to solve their problems, increasing the need for alternative methods of dispute resolution and problem-solving courts.⁵³

The Strategic Plan of the Judicial Branch of Puerto Rico took these facts into account and incorporated data and other input from a Judicial Conference on Access to Justice held in 2002.⁵⁴ As a result, community relations have been given high priority, a *pro se* program was instituted, and problem-solving courts, such as drug courts, domestic-violence courts, and unified family and juvenile courts, have been established. Court improvement programs are also in place.

Another important initiative is the creation of special procedures and guidelines for cases involving homeless people. The approval of these guidelines illustrates what can happen when we truly listen and empathize with people we otherwise would not know. There were no procedures in place regarding the homeless when a newspaper article reported that a homeless citizen appeared in court and asked to be put in jail. He admitted to using drugs and asked the court for help but, since he had not committed a crime, the judge believed there was nothing he could do and sent him back to the streets. Eventually, police officers found him and placed him in an institution so he could receive the help he needed. The special procedures, adopted after this situation was known, recognize that attention must be given to the homeless who go the courts looking for help; that a person does not have to break the law in order to be noticed by the court; and that we bear some responsibility even if what is needed is not necessarily within the scope of the judicial system's traditional mandate.⁵⁵

Another important initiative is the creation of special procedures and guidelines for cases involving homeless people.

52. See Puerto Rico Judicial Branch, Judicial Academy of Puerto Rico, <http://www.ramajudicial.pr/academia/index.htm>.

53. Puerto Rico Judicial Branch, *Visión en ruta al futuro: Informe de la Comisión Futurista de los Tribunales* 41-100 (2000).

54. See PRIMER CONGRESO ACCESO A LA JUSTICIA (XXII CONFERENCIA JUDICIAL, 2 Y 3 DE MAYO DE 2002) (2005); Puerto Rico Judicial Branch, *Strategic Plan 2012-2015, Justicia y servicio: servicio y justicia* (2012), available at <http://www.ramajudicial.pr/orientacion/informes/rama/Plan-estrategico-2012-2015.pdf>; Puerto Rico

Judicial Branch, *Strategic Plan 2007-2011, Obra de justicia* (2007); Puerto Rico Judicial Branch, *Strategic Plan 2002-2006* (2002), available at <http://www.ramajudicial.pr/orientacion/informes/rama/estrategico.pdf>.

55. Puerto Rico Judicial Branch, Protocol for the Attention, Orientation, and Referral of Homeless Persons at the Courts (2010), available at <http://www.ramajudicial.pr/leyes/protocolo-orientacion-y-referido-personas-sin-hogar-presentan-tpi-feb-2010.PDF>.

VII. CONCLUSION

Judges are human beings; we all have opinions and fears, and we are not immune to prejudices. As individuals, we must recognize these weaknesses and overcome them to pass judgment over others. In the case of disadvantaged and vulnerable communities, the only way we can solve their claims objectively and fairly is by recognizing that these communities are composed of citizens who, like us, struggle with numerous problems daily and whose only agenda is to exercise their right to live in a dignified manner. Our commitment to justice should give us the introspection necessary to neutralize the prejudices that limit our capacity to listen to and to understand their claims. As judges, our objective should be to understand and comprehend each community's reality and the obstacles they each face to obtain justice. True access to justice can only be achieved when a judge uses the law, not as an end in itself, but as a tool for justice.

If society is to be more than a space for competition and survival of the fittest, it is not enough to have faith in justice; we must seek it out, nurture it, harvest it, and be willing to share it with others. A former Associate Justice of the Supreme Court of Puerto Rico, Carlos Irizarry Yunque, referring to the fact that justice is always shown blindfolded, said it best: “[N]ever forget that under the blindfold there must be eyes that can be opened to detect the injustice of human inequality. Remember, that though blindfolded in order not to see, Lady Justice must have very sensitive ears to listen . . . to the clamor of the humble who cannot always be heard.”⁵⁶



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56. Statement made during Chief Justice Víctor M. Pons Núñez's Swearing-In Ceremony, 116 D.P.R. XLVIII (1985).

The Supreme Court's Emerging Jurisprudence on the Punishment of Juveniles:

Legal and Policy Implications

Joanna L. Visser & Jeffrey J. Shook

In the 1980s and 1990s, nearly every state enacted legislative changes that eased the process of treating juveniles as adults. Scholars seeking to understand the consequences of these changes have found evidence of an increase in the number of juveniles transferred to criminal court and sentenced as adults. As part of this increase, the number of juveniles receiving sentences of life without the opportunity for parole (LWOP) rose substantially. In fact, a large majority of the approximately 2,600 individuals serving LWOP sentences for crimes committed as juveniles (under age 18) were sentenced over the last several decades. LWOP sentences for juveniles, which preclude the possibility of release at any point except through clemency or a pardon, have drawn a considerable amount of criticism and have been the focus of a great deal of litigation and policy-reform efforts. Responding to this criticism, the United States Supreme Court issued two decisions over the last few years limiting the extent to which juveniles can receive LWOP sentences, *Graham v. Florida*¹ and *Miller v. Alabama*.² Despite these decisions, numerous questions remain regarding the appropriate and allowable levels of punishment for young offenders that courts and legislatures will continue to grapple with for the foreseeable future.

This article explores these questions through an examination of the legal and legislative landscape of LWOP sentences for juveniles in light of these decisions. Part I begins with a discussion of the broader context of legislative changes that eased the process of treating juveniles as adults and the consequences of the changes. Part II shifts to a discussion of Supreme Court decisions on the death penalty for juveniles that provide the foundation for the *Graham* and *Miller* decisions, with a specific focus on the Court's decision in *Roper v. Simmons*.³ Part III discusses the *Graham* decision and the significance of the Court's decision to extend its analysis in *Roper*

outside of the death-penalty context. Part IV then turns to the *Miller* decision, providing an analysis of the decision and a discussion of several issues that courts and legislatures are grappling with following *Graham* and *Miller*. In particular, we will discuss how courts have treated the question of virtual LWOP, term-of-year sentences that are the functional equivalent of life without parole for juveniles. In addition, in Part V, we will focus on the response of courts and legislatures specifically to *Miller* in light of its ban on mandatory LWOP sentences. This part will focus on Pennsylvania, the state with the most individuals serving LWOP sentences for crimes committed as juveniles. In the immediate aftermath of *Miller*, the Pennsylvania Supreme Court heard two cases regarding the implementation of *Miller*, and the Pennsylvania General Assembly has passed legislation to bring the state in line with *Miller*. The article will conclude by highlighting key issues that need to be addressed by courts and legislatures going forward.

I. THE SHIFTING BOUNDARY BETWEEN JUVENILE AND CRIMINAL COURTS

Although transfer provisions vary considerably across states, during the 1980s and 1990s, every state changed their transfer laws to facilitate the process of treating juveniles as adults.⁴ These changes have generally served to lower or eliminate the minimum age of eligibility to be treated as an adult, to expand the offenses eligible for adult treatment, to move waiver criteria toward offense-based characteristics, to shift discretion from judges to prosecutors, and to create additional avenues to handle juvenile offenders in the justice systems.⁵ The result of these changes has been a transformation of the boundary between juvenile and criminal courts, and, as a result, an increase in the number of juveniles being treated as adults.⁶

Given these developments, researchers have sought to iden-

Footnotes

1. 130 S. Ct. 2011 (2010).
2. 132 S. Ct. 2455 (2012).
3. 543 U.S. 551 (2005).
4. See PATRICK GRIFFIN, PATRICIA TORBET, & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1998); PATRICIA TORBET, RICHARD GABLE, HUNTER HURST IV, IMOGENE MONTGOMERY, LINDA SZYMANSKI, & DOUGLAS THOMAS, STATE RESPONSE TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY

PREVENTION (1996); PATRICIA TORBET & LINDA SZYMANSKI, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1998). See also Jeffrey J. Shook, *Contesting Childhood in the U.S. Justice System: The Transfer of Juveniles to the Adult Criminal Court*, 12 CHILDHOOD: GLOBAL J. CHILD RES. 461 (2005).

5. *Id.*
6. Assessing the overall effect of the legislative changes is difficult given data limitations and decreases in juvenile crime. See JEFFREY FAGAN & FRANKLIN E. ZIMRING, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT (2000); and

tify the effects of these changes on both youth and society. Despite the rhetoric of the legislative changes of the 1980s and 1990s, it is clear from the evidence that the vast majority of young people sentenced in criminal court do not receive sentences that extend far into their adulthood.⁷ In fact, there is significant evidence that large percentages of young people convicted in the criminal court are placed on probation, sentenced to a term of months in local jails, or receive prison sentences that are not much longer than the punishments available in the juvenile justice system.⁸ This is problematic because youth in the criminal justice system are less likely to receive programs and services, are subject to higher rates of victimization, and experience worse mental-health outcomes.⁹ Thus, it is clear that, when treated as adults, many juveniles are essentially receiving the same sentence that they could otherwise receive in the juvenile system without sufficient programs and services. In addition, being convicted in an adult criminal court means that a youth is likely to have a felony record, a result that has a detrimental effect on his or her life opportunities; other studies have found that incarceration during adolescence and early adulthood has negative consequences for the transition to adulthood.¹⁰ For example, numerous studies have also found that transferred juveniles are more likely to recidivate than youth retained in the juvenile justice system, calling into question the public-safety consequences of sentencing juveniles as adults.¹¹

LIFE WITHOUT THE OPPORTUNITY FOR PAROLE FOR JUVENILES

In light of the findings discussed above, some states are reconsidering their transfer policies, and a number have enacted new policies regarding the transfer of young people to, and the treatment of young people in, the criminal justice system.¹² One area that has received a great deal of attention is the issue of LWOP sentences for juveniles. As discussed previously, the vast majority of young people convicted in criminal court do not receive long sentences.¹³ This is, in large part, a reflection of the reality that transfer to criminal court is not limited to juveniles who commit the most violent and serious offenses, and that the legislative changes of the 1980s and 1990s broadened the population of youth subject to transfer to criminal court.¹⁴ At the same time, a common thread of these legislative changes was a trend to remove discretion from judges for deciding whether youth charged with specific offenses, often violent crimes, should be transferred to criminal court.¹⁵ The impetus behind these changes was, in most respects, the desire to increase the number of these youth who were transferred to

[T]he vast majority of young people convicted in criminal court do not receive long sentences.

- Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST.: REV. RES. 81 (Michael Tonry ed., 2000), for a discussion of the effects of the legislative changes on the number of juveniles treated as adults. See also Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?*, 54 WAYNE L. REV. 1725 (2008), for an analysis of 20 years of the commitment of juveniles to adult prisons in Michigan.
7. These changes were driven, in large part, by a changing image of juvenile offenders that featured young people as “superpredators” and dangerous thugs. The idea was that these young people were the “worst of the worst” and needed to receive adult (i.e., severe) sentences to protect society. Shook, *supra* note 4. See Richard Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 YOUTH VIOLENCE & JUV. JUST. 128 (2003), for a discussion of differences in sentencing between juvenile and criminal courts. See also Eric J. Fritsch, Tony J. Caeti, & Craig Hemmens, *Spare the Needle but Not the Punishment: The Incarceration of Waived Youth in Adult Prisons*, 42 CRIME & DELINQ. 593 (1996), for a discussion of the time served by juveniles in adult prisons; Shook & Sarri, *supra* note 6.
 8. *Id.* See also PENNSYLVANIA COMMISSION ON SENTENCING, SENTENCING IN PENNSYLVANIA: ANNUAL REPORT 2011, available at <http://pcs.la.psu.edu/publications-and-research/annual-reports>.
 9. Bishop, *supra* note 6. See also Irene Y.H. Ng, Rosemary C. Sarri, Jeffrey J. Shook, & Elizabeth Stoffregen, *Comparison of Correctional Services to Youths Incarcerated in Juvenile and Adult Facilities in Michigan*, PRISON J. (forthcoming); Irene Y.H. Ng, Xiaoyi Shen, Rosemary C. Sarri, Elizabeth Stoffregen, & Jeffrey J. Shook, *Adult Incarceration of Juveniles as a Factor of Depression*, 21 CRIM. BEHAV. & MENTAL HEALTH 21 (2011); Jennifer L. Woolard, Candice Odgers, Lonn Lanza-Kaduce, & Hayley Daglis, *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT’L J. FORENSIC MENTAL HEALTH 1 (2005).
 10. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003); Stephen Raphael, *Early Incarceration Spells and the Transition to Adulthood*, in THE PRIZE OF INDEPENDENCE: THE ECONOMICS OF EARLY ADULthood (Sheldon Danziger & Cecilia Rouse eds., 2007); Christopher Uggen & Sara Wakefield, *Young Adults Reentering the Community from the Criminal Justice System: The Challenge of Becoming an Adult*, in ON YOUR OWN WITHOUT A NET: THE TRANSITION TO ADULthood FOR VULNERABLE POPULATIONS (D. Wayne Osgood, E. Michael Foster, Constance Flanagan, & Gretchen R. Ruth eds., 2005).
 11. See ROBERT HAHN, ANGELA MCGOWAN, AKIVA LIEBERMAN, ALEX CROSBY, MINDY FULLILOVE, ROBERT JOHNSON, EVE MOSCICKI, LESHAWNDRRA PRICE, SUSAN SNYDER, FARRIS TUMA, JESSICA LOWY, PETER BRISS, STELLA CORY, & GLENDA STONE, EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM: A REPORT ON RECOMMENDATIONS OF THE TASK FORCE ON COMMUNITY PREVENTIVE SERVICES (2007), CENTERS FOR DISEASE CONTROL AND PREVENTION; and RICHARD E. REDDING, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (2008) for reviews of the general and specific deterrent effects of these legislative changes.
 12. CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM, available at http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf.
 13. See *supra* notes 7-8.
 14. See *id.*; see also Shook, *supra* note 4.
 15. *Id.*

[T]here is strong support for the conclusion that the legislative changes . . . have had a range of negative and harmful consequences

and sentenced in criminal court.¹⁶

A review of the evidence on transfer and sentencing reveals that this intent was realized.¹⁷ With regard to LWOP, the number of juveniles receiving these sentences began to rise in the mid-1980s and rose substantially until peaking and beginning to decline in the

late 1990s and into the 2000s.¹⁸ One reason for this increase was the nature of criminal-court sentencing policy. Because most state sentencing provisions do not distinguish between juveniles and adults in criminal court, juveniles are subject to the same sentences as adults.¹⁹ In the majority of states that allow juveniles to receive life without the opportunity for parole sentences, LWOP is mandatory upon conviction of specific offenses.²⁰ While LWOP sentences for juveniles increased both in states with discretionary and with mandatory sentencing provisions, the rate of LWOP sentences differed substantially, as states with mandatory sentencing provisions sentenced juveniles to LWOP at significantly higher rates than states with discretionary sentencing provisions.²¹ Thus, it is apparent that the combination of changing laws and mandatory transfer and sentencing structures account for a large proportion of juveniles sentenced to LWOP.

II. THE ROAD TO MILLER: THE DEATH PENALTY

Based on the evidence, there is strong support for the conclusion that the legislative changes of the 1980s and 1990s have had a range of negative and harmful consequences for both young people and society. Despite this conclusion and the reality that those legislative changes reflected a fairly dramatic departure in juvenile justice policy and practice, courts generally did not strike down provisions allowing juveniles to be

punished similarly to adults.²² The limited legal intervention, in large part, is rooted in a state's general authority to establish and regulate its juvenile justice system, especially with regard to determining who is within the jurisdiction of the juvenile justice system.²³

In the late 1980s, however, the United States Supreme Court did decide two cases pertaining to the punishment of juvenile offenders. These cases considered the question of whether it was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment to execute individuals convicted of crimes that occurred before their 18th birthday. In the first case, *Thompson v. Oklahoma*, the Court held that it was unconstitutional to execute someone who was less than 16 years old at the time of his or her offense.²⁴ The case involved a 15-year-old named William Thompson who was convicted of murder in Oklahoma.

In reaching its decision, the majority applied the "evolving-standards-of-decency test" and determined that there was a national consensus against executing individuals under the age of 16 at the time of their offense.²⁵ In particular, the Court found that 18 states that allowed the death penalty, in addition to the 14 states that did not, prohibited it for individuals under the age of 16 to support the "conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense."²⁶ The Court also determined that the rarity in which the penalty was applied to individuals under 16 evidenced that this penalty was "abhorrent to conscience of the community."²⁷ In addition, the Court asserted that because of a juvenile's "lesser culpability, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, the retributive purpose underlying the death penalty is simply inapplicable to the execution of a 15-year-old offender."²⁸ Similarly, the Court reasoned that a youth's status reduced the deterrent justification for the death penalty.²⁹

A year later, the Supreme Court decided a second case regarding the execution of juveniles involving a 16-year-old

16. *Id.*

17. *Id.*

18. See SECOND CHANCES 4 YOUTH, BASIC DECENCY: PROTECTING THE HUMAN RIGHTS OF CHILDREN (2012), for a discussion of trends in the sentencing of juveniles to LWOP. See ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA, THE SENTENCING PROJECT (2009), for a discussion of the increasing use of LWOP sentences in the United States; see also EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL PUNISHMENT: SENTENCING 13- AND 14-YEAR OLD CHILDREN TO DIE IN PRISON (2007); HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2005); and MICHIGAN ACLU, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS (2004), for more context on LWOP sentences for juveniles.

19. See Jeffrey J. Shook, *Sentencing Juveniles to Life Without the Opportunity for Parole*, in HANDBOOK OF JUVENILE FORENSIC PSYCHIATRY AND PSYCHOLOGY (Elena L. Grigorenko ed., 2012).

20. *Id.* This means that juveniles in these states were sentenced to LWOP without consideration of factors such as developmental status, family circumstances, and a variety of other factors that

could mitigate against LWOP. In many states, the combination of mandatory transfer and mandatory sentencing provisions removed judicial discretion entirely from the decision-making process.

21. *Id.* See also petitioner's brief in *Miller v. Alabama* and *Jackson v. Hobbes* for a discussion of differences between mandatory and discretionary states.

22. See Linda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

23. *Id.*

24. 487 U.S. 815 (1988).

25. *Id.* The decision was 5-3, and the majority opinion was written by Justice Stevens and joined by Justices Brennan, Marshall, and Blackmun. Justice O'Connor concurred in the judgment.

26. *Id.* at 830.

27. *Id.* at 832.

28. *Id.* at 836-837.

29. *Id.*

convicted of murder. In the decision, *Stanford v. Kentucky*, the majority opinion held that it was permissible under the Eighth Amendment to execute an individual who was 16 or 17 years old at the time of his or her offense.³⁰ Unlike in *Thompson*, the majority found that there was not a national consensus against executing 16- and 17-year-olds.³¹ Further, the majority rejected the argument relied upon in *Thompson* that the reluctance of juries to impose the death penalty on 16- and 17-year-olds was evidence of a consensus against the punishment.³² The majority opinion also rejected arguments regarding the reduced culpability for young people as a basis for finding the death penalty for 16- and 17-year-olds unconstitutional.³³ Thus, although the Court was willing to prohibit the death penalty for those under the age of 16, it was not willing to draw a line prohibiting the death penalty for all juveniles.

ROPER V. SIMMONS

The Supreme Court revisited this issue less than two decades later when it decided the case of *Roper v. Simmons*.³⁴ The decision to hear *Roper* came soon after the Court decided another case regarding the death penalty. This case, *Atkins v. Virginia*, addressed whether it was a violation of the Eighth Amendment to execute someone who was mentally retarded.³⁵ Similar to the juvenile death penalty, the Supreme Court had found that it was constitutional to do so in a case decided in 1989.³⁶ In *Atkins*, however, a majority of the Court found that there was evidence of a societal consensus against executing the mentally retarded and raised the potential of another challenge to the juvenile death penalty.³⁷

Roper, decided just three years after *Atkins*, involved 17-year-old Christopher Simmons who was convicted of first-degree murder and sentenced to death in Missouri. Simmons appealed his sentence, and the Missouri Supreme Court ruled that it constituted cruel and unusual punishment.³⁸ The Supreme Court granted certiorari and decided the case in March 2005. The majority decision relied on the fact that since *Stanford*, 5 states had abolished the death penalty for juve-

niles—joining the 30 states that did not allow for the execution of juveniles—in finding that there was a societal consensus against executing juveniles.³⁹ In addition to this analysis, the majority opinion assessed other evidence to support its decision, extending its reasoning in *Thompson* regarding the reduced culpability of juveniles and their capacity to change.⁴⁰ Specifically, the majority used this evidence to draw three conclusions regarding differences between juveniles and adults: (1) juveniles possessed “[a] lack of maturity and an underdeveloped sense of responsibility” that often leads to “impetuous and ill-considered actions and decisions”; (2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and (3) “the character of a juvenile is not as well formed as an adult.”⁴¹

These conclusions led the Court to reason that juveniles were not as culpable or blameworthy as adults, and it therefore determined that they could not reliably be classified among the worst offenders and that executing juveniles was not supported by penological interests.⁴² Thus, the majority enacted a categorical rule prohibiting the execution of someone for a crime he or she committed under the age of 18. Although the dissents argued that the individualized approach used by courts in death-penalty decisions was adequate to account for differences between juveniles and adults, the majority rejected this approach.⁴³ The majority also noted the contradictions that exist in denying juveniles the rights of citizenship (e.g., right to vote, sit on juries, etc.) but subjecting them to the most severe penalties administered by the state.⁴⁴ Finally, it used international law to justify its decision by noting the “stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty” and

These conclusions led the Court to reason that juveniles were not as culpable or blameworthy as adults

30. 492 U.S. 361 (1989).

31. *Id.* The majority decision was written by Justice Scalia and joined by Chief Justice Rehnquist and Justices White and Kennedy. Justice O'Connor concurred that there was not a national consensus against executing 16- and 17-year-olds.

32. *Id.*

33. *Id.*

34. 543 U.S. 551 (2005).

35. 536 U.S. 304 (2002).

36. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

37. 536 U.S. 304 (2002).

38. *See State ex. rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003).

39. *Id.*

40. *Id.* In particular, the majority decision cited an article by Elizabeth Scott and Laurence Steinberg examining whether evidence from research on adolescent development mitigated against the death penalty for juveniles. The majority also relied on amicus briefs submitted by the American Psychological Association, the American Medical Association, and other organizations to draw its conclusions regarding differences between juveniles and adults.

41. *Id.* at 569-570.

42. *Id.* The Court considered whether the execution of minors was supported by four penological interests: deterrence, retribution, incapacitation, and rehabilitation. Based on its conclusions regarding differences between juveniles and adults, the majority determined that penological interests underlying the use of the death penalty did not support the execution of juveniles.

43. *Id.* at 573. In rejecting this approach, the majority argued that “differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” The majority expressed concern that “an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.” It also questioned the ability of psychologists to “differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”

44. *Id.* at 575.

Given the severity of the sentence—life in prison without the possibility of release—the Court considered whether it met penological goals

the fact that the juvenile death penalty is prohibited in international treaties and conventions.⁴⁵

In declaring that juveniles are “categorically less culpable than adults,” the *Roper* decision presented a strong rationale for treating juveniles differently and, at least symbolically, called into question sentencing schemes that treated juveniles similarly to

adults. Yet Supreme Court jurisprudence has traditionally treated the death penalty differently, meaning that death-penalty decisions generally did not apply outside of that context. Thus, questions remained regarding whether and how *Roper* would be applied to other sentences for young people.

III. NEXT STEP ON THE ROAD: BANNING LWOP FOR NONHOMICIDE OFFENSES

Following *Roper*, many individuals serving LWOP or other long sentences for crimes committed as juveniles challenged their convictions. Most of these challenges, however, were denied because courts determined that *Roper* did not apply outside of the death-penalty context. The Supreme Court, however, granted certiorari in two cases in 2009: *Graham v. Florida*⁴⁶ and *Sullivan v. Florida*. The issue considered by the Court in *Graham* and *Sullivan* was whether, pursuant to an Eighth Amendment analysis, it was cruel and unusual punishment to sentence a juvenile convicted of a nonhomicide offense to LWOP.⁴⁷ Building upon its analysis in *Roper*, the majority decision enacted a categorical rule prohibiting LWOP sentences for juveniles convicted of nonhomicide offenses based on its determination that such a sentence constituted cruel and unusual punishment.⁴⁸ In reaching this decision, the majority used the evolving-standards-of-decency analysis⁴⁹ and concluded that there was a societal consensus against the punishment because despite the fact that LWOP sentences were available in 37 states (plus the District of Columbia and federal government), only 11 states had sentenced a juvenile to

LWOP for a nonhomicide offense and only 123 juveniles had ever been sentenced to LWOP for nonhomicide offenses.⁵⁰

Similar to *Roper*, the *Graham* decision was based on a review of existing research regarding adolescent development. Based on its review of the research, the majority asserted:

No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.⁵¹

Based on the reduced culpability of juveniles and a long recognition that those “who do not kill, intend to kill, or foresee that life will be taken are less deserving of the most serious forms of punishment than are murderers,” the majority reasoned that, “[i]t follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁵²

Given the severity of the sentence—life in prison without the possibility of release—the Court considered whether it met penological goals and concluded that because juveniles are less culpable than adults and have more potential for change, sentencing juveniles to LWOP for nonhomicide offenses could not be justified through these goals.⁵³ Interestingly, Chief Justice Roberts concurred in the decision in *Graham*. In a separate opinion, he argued that while he did not agree with the categorical rule advanced by the majority, he did believe that the LWOP sentence was not proportional in the case of Terrance Graham.⁵⁴ He proposed a case-by-case “narrow proportionality” analysis, accounting for an “offender’s juvenile status,” to determine whether the punishment is proportional to the crime. In reaching this conclusion, Chief Justice Roberts asserted, “*Roper*’s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here.”⁵⁵ As noted, the majority rejected this approach and adopted a categorical rule in large part because of the difficulty in making this determination while an individual was still a juvenile.⁵⁶

45. *Id.*

46. *Graham v. Florida*, 130 S. Ct. 2011 (2010). *Sullivan v. Florida* was a companion case that was not decided because of procedural issues and because Joe Sullivan was subject to relief under *Graham*.

47. *Id.*

48. *Id.*

49. See *Roper*, 543 U.S. at 560-61.

50. *Graham*, 130 S. Ct. at 2024.

51. *Id.* at 2026.

52. *Id.* at 2027.

53. *Id.* at 2030 (“ . . . penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders”). The majority also used international law as part of its analysis and concluded that the U.S. was the only country to sentence juveniles to LWOP. It did so based on the rationale that it “has treated the laws and practices of other nations and international agreements as rel-

evant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.” *Id.*

54. See *id.* at 2036 (“I agree with the Court that Terrance Graham’s sentence of life without parole violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’ Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court’s precedents, in particular (1) our cases requiring ‘narrow proportionality’ review of noncapital sentences and (2) our conclusion in *Roper v. Simmons* [citation omitted] that juvenile offenders are generally less culpable than adults who commit the same crimes.”).

55. *Id.*

56. *Id.*

Like *Roper*, *Graham* was a momentous decision. Not only did it confirm and extend the findings from *Roper* regarding differences between juveniles and adults, it also extended this rationale to create a categorical rule banning a punishment outside of the death-penalty context. The question, then, was how *Graham* would be implemented and whether it would be extended to other categories of cases or punishments.

IV. WHERE WE ARE TODAY: MILLER V. ALABAMA AND JACKSON V. HOBBS

On June 25, 2012, the Court announced its decision in *Miller v. Alabama* and its companion case, *Jackson v. Hobbs*, thereby fundamentally altering the landscape of juvenile sentencing law in the United States. Finding that “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children,”⁵⁷ the Court built on its Eighth Amendment juvenile sentencing jurisprudence in *Thompson*, *Roper*, and *Graham* by finding mandatory LWOP sentences unconstitutional for youth under the age of 18. The following section provides a brief analysis of the *Miller* decision and, using Pennsylvania as a case study, discusses how one state has sought to bring itself into compliance with *Miller*.

THE CASES

Evan Miller and Kuntrell Jackson, both 14 years old when they were convicted of murder, suffered traumatic life experiences before they were sentenced to mandatory terms of life in prison without the possibility of parole. In *Miller*’s case, he was charged and convicted of first-degree murder and arson. In *Jackson*’s case, he was charged and convicted of felony murder for his role as a lookout and non-triggerman in an armed robbery gone awry.

KUNTRELL JACKSON

Kuntrell Jackson was raised in an abusive and impoverished Arkansas household with significant exposure to gun violence. “Kuntrell’s mother was sent to prison for shooting and injuring a neighbor when Kuntrell was about six years old. When Kuntrell was about thirteen years old, his older brother [] was also imprisoned for shooting someone. Not long after this, [Kuntrell’s abusive father figure] left the family; two of Kuntrell’s teenage sisters became pregnant; and several other relatives were incarcerated.”⁵⁸ In 1999, Jackson and two other boys decided to rob a video store. Upon learning that one of the other boys was carrying a sawed-off shotgun, Jackson decided to stay outside when the other boys entered the store.

There was a struggle with the storekeeper, Jackson entered the store, and when the storekeeper threatened to call the police, one of the other boys shot and killed her. The three boys fled empty-handed.⁵⁹

The prosecutor in Jackson’s case exercised his authority to charge Jackson as an adult,⁶⁰ and Jackson was charged with capital felony murder and aggravated robbery. The trial court denied his motion to transfer the case to juvenile court, and an appellate court affirmed.⁶¹ A jury then convicted Jackson of both crimes, and the judge sentenced Jackson to LWOP, the only statutorily available sentence.⁶² Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the convictions. Two years later, Jackson filed a state petition for habeas corpus, challenging his sentence under *Roper v. Simmons* and then under *Graham v. Florida*. The Arkansas Supreme Court affirmed the circuit court’s dismissal of Jackson’s petition, finding that “*Roper* and *Graham* were ‘narrowly tailored’ to their contexts: ‘death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile.’”⁶³

EVAN MILLER

Evan Miller grew up “in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old.”⁶⁴ In *Miller*’s case, the crime occurred one evening, after the victim, Cole Cannon, came to Miller’s home to make a drug deal with Miller’s mother. Miller and a friend followed Cannon back to his trailer and spent the rest of the night smoking marijuana and playing drinking games. When Cannon passed out, Miller and his friend took money from his wallet. When Miller tried to put the wallet back into Cannon’s pocket, Cannon awoke, and a fight ensued, during which Miller struck Cannon repeatedly with a baseball bat. In an attempt to cover up their crime, the two boys set fire to Cannon’s trailer, and Cannon eventually died from his injuries and from smoke inhalation.⁶⁵ As the Court

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57. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012).

58. Jackson’s Petition for Writ of Certiorari, 2011 WL 5322575, at 4-5, *Miller*, 132 S. Ct. 2455 (No. 10-9647) (internal citations omitted).

59. *Miller*, 132 S. Ct. at 2461.

60. Justice Kagan notes, “Arkansas law gives prosecutors discretion to charge 14-year-olds as adults when they are alleged to have committed certain serious offenses.” *Id.* (citing ARK. CODE ANN. § 9-27-318(c)(2) (1998)).

61. *Id.* (citing *Jackson v. State*, No. 02-535, 2003 WL 193413 at 1 (Ark. App., 2003); ARK. CODE ANN. §§ 9-27-318(d), (e)).

62. See ARK. CODE ANN. § 5-4-104(b) (1997) (“A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole.”). Because Jackson was ineligible for the death penalty under *Thompson*, 485 U.S. 815, the only available sentencing option was life imprisonment without parole.

63. *Miller*, 132 S. Ct. at 2461 (citing *Jackson v. Norris*, 2011 Ark. 49, ___S.W. 3___, at 5 (2012)).

64. *Id.* at 2462 (citing E.J.M. v. State, 928 So. 2d 1077, 1081 (Ala. Crim. App. 2004) (Cobb, J., concurring in result)); App. in No. 10-9646, pp. 26-28).

65. *Id.*

The Court focuses on the fundamental developmental differences between youth and adults

noted in the *Miller* decision, Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. [] The D.A. did so, and the juvenile court agreed to transfer after a hearing.

. . . The State accordingly charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. [Citations omitted.] Relying in significant part on testimony from [Miller's friend], who had pleaded to a lesser offense, a jury found Miller guilty. . . . The Alabama Court of Criminal Appeals affirmed . . . [and the] Alabama Supreme Court denied review.⁶⁶

The Supreme Court granted certiorari in both cases—*Miller* on direct appeal and *Jackson* on collateral review.

THE DECISION

The Supreme Court, in a 5-4 decision authored by Justice Elena Kagan, declared Miller and Jackson's mandatory LWOP sentences unconstitutional.⁶⁷ Justice Kagan's analysis in the *Miller* decision is rooted in the Court's Eighth Amendment jurisprudence and rests on the convergence of "two strands of precedent reflecting [the Court's] concern with proportionate punishment."⁶⁸ The first line relates to "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."⁶⁹ The second line stems from cases prohibiting the mandatory imposition of capital punishment, "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."⁷⁰

The Court focuses on the fundamental developmental differences between youth and adults to establish the disproportionality of mandatory LWOP sentences for juveniles and the corresponding need for individualized sentencing of youth

convicted of murder. In setting forth the key aspect of the opinion, Kagan builds on the premise established by the *Roper* and *Graham* decisions—that, based on continuously evolving science and social-science research, "children are constitutionally different than adults for purposes of sentencing."⁷¹

As in *Roper* and *Graham*, the *Miller* decision underscores the lack of any penological justification for "imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."⁷² To reach this conclusion, the Court reviewed its previous analyses of retribution, deterrence, and incapacitation in the juvenile-sentencing context and found that none of the traditional penological rationales support the existence of mandatory LWOP sentences for juveniles.⁷³

The Court further relied on its line of reasoning in *Graham* by likening LWOP sentences for juveniles to the death penalty itself.⁷⁴ Looking to *Woodson v. North Carolina*⁷⁵ and its progeny, which call for individualized sentencing and the ability to consider mitigating factors in capital cases,⁷⁶ the *Miller* Court argues that the same rationale should be extended to juveniles facing the state's harshest available penalty. In extending *Woodson's* rationale to the juvenile-sentencing context, *Miller* mandates sentencing processes tailored to account for the distinct attributes of youth:

In light of *Graham's* reasoning, these [death-penalty] decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. . . . So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.⁷⁷

Accordingly, to comply with *Miller*, states must implement processes and procedures reflective of the substantive change to sentencing law. By extending traditional death-penalty sentenc-

66. *Id.* at 2462-63.

67. Justice Kagan was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justice Breyer wrote a concurring opinion focused on the felony-murder rule, in which Justice Sotomayor joined. Chief Justice Roberts, as well as Justices Thomas and Alito, filed dissenting opinions in which Justice Scalia joined.

68. *Id.* at 2463.

69. *Id.* See, e.g., *Roper*, 543 U.S. 551; *Graham*, 130 S. Ct. 2011; *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (finding imposition of death penalty for nonhomicide offenses unconstitutional); *Atkins*, 536 U.S. 304 (finding Eighth Amendment violation in the imposition of death penalty on mentally retarded defendants).

70. *Id.* at 2464 (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978)).

71. *Id.* See also *id.* at 2465, n. 5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper's* and *Graham's* conclusions have become even

stronger.").

72. *Id.* at 2465.

73. See, e.g., *id.* at 2464-65 (Noting the unique juvenile capacity for rehabilitation: "[Scientific] findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (quoting *Graham*, 130 S. Ct. at 2027)).

74. *Id.* at 2466.

75. 428 U.S. 280 (1976) (invalidating a mandatory death sentence for first-degree murder on Eighth Amendment grounds).

76. *Miller*, 132 S. Ct. at 2467 (citing *Sumner v. Shuman*, 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-112 (1982); *Lockett*, 438 U.S. at 597-609).

77. *Id.* at 2467-68.

ing procedures to the juvenile-sentencing context, the *Miller* decision creates a requirement of individualized sentencing hearings and review of mitigating circumstances whenever juveniles charged as adults are facing LWOP sentences.⁷⁸ To aid the lower courts' review of such mitigating factors, as applied to juveniles, the Court outlined the factors a sentencer must consider, including: (1) the youth's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the youth's "family and home environment that surrounds him"; (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) "the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys;" and (5) "the possibility of rehabilitation."⁷⁹

Despite its sometimes-sweeping language, *Miller* leaves us with a relatively constricted holding: "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."⁸⁰ Yet the narrow holding results in broad implications for juvenile sentencing going forward, as Marsha Levick notes in the *Criminal Law Reporter*:

A close reading of Kagan's opinion suggests that the whole may be greater than the sum of its parts. From the outset of her opinion, Kagan made clear that the social science and other scientific research that had informed the court's decisions in *Roper*, *Graham*, and *J.D.B.* dictated a similar outcome in *Miller*. Consequently, while affording narrow specific relief, *Miller* still provides a broad framework for rethinking our treatment of juvenile offenders.⁸¹

Further, as Professor Erwin Chemerinsky writes, *Miller* stands apart from its juvenile sentencing counterparts in terms of its future implications:

At first glance, the decision seems to follow from other recent Supreme Court decisions that have limited the punishments imposed on juvenile offenders. But in a key respect this case is different: previous cases prohib-

ited the imposition of certain punishments under any circumstances, whereas *Miller* holds only that there cannot be a mandatory sentence. This distinction is going to matter enormously and raise important issues that are sure to be litigated.⁸²

V. POST-MILLER IMPLEMENTATION: NEXT STEPS ON THE ROAD?

As is evident, the Supreme Court has been unequivocal in its conclusions that young people are different than adults and should be subject to different punishments. This conclusion is especially important in light of the trend over the last few decades to punish them similarly to adults. Numerous questions remain, however, regarding how courts and legislatures will implement both the letter and spirit of these decisions. While an exhaustive examination of these issues is beyond the scope of this article, below we discuss several specific issues that courts and legislatures are grappling with in response to these decisions—"virtual LWOP" and decisions regarding the sentencing options available for courts in light of *Miller*.⁸³

"VIRTUAL LWOP"

In addition to those serving LWOP for crimes committed as juveniles, many individuals are serving long sentences for non-homicide crimes committed as juveniles and challenges have been brought to some of these sentences in both state and federal courts under *Graham*. In *People v. Caballero*, the California Supreme Court considered the question of whether a "110-year-to-life sentence [for attempted murder] contravenes *Graham*'s mandate against cruel and unusual punishment under the Eighth Amendment."⁸⁴ In concluding that it did, the California Supreme Court drew from *Graham*'s assertion that the Eighth Amendment requires a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."⁸⁵

The *Caballero* court rejected the state's contention that

Despite its sometimes-sweeping language, *Miller* leaves us with a relatively constricted holding

78. See also Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J., Aug 8, 2012, available at http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/ (noting that the inability to mandatorily impose life without parole sentences on juveniles "will necessitate a penalty phase after conviction to make [the sentencing] decision. After the Supreme Court held that there cannot be a mandatory death sentence in homicide cases, the practice of the penalty phase developed for a determination of whether capital punishment is warranted based on the facts in each case. The same type of penalty phase will be required when life without parole is sought for a homicide crime committed by a juvenile").

79. *Miller*, 132 S. Ct. at 2468.

80. *Id.* at 2469.

81. Marsha Levick, *From a Trilogy to a Quadrilogy: Miller v. Alabama*

Makes It Four in a Row For U.S. Supreme Court Cases That Support Differential Treatment of Youth, 91 CRIM. L. REP. 748 (2012).

82. Chemerinsky, *supra* note 78.

83. Another question involves the current status of cases where juveniles were sentenced to LWOP for nonhomicide offenses. Because *Graham* found the sentences of juveniles serving LWOP for nonhomicide offenses unconstitutional, those individuals needed to be resentenced. Most courts determined that *Graham* did apply retroactively to juveniles already serving LWOP for nonhomicide offenses. While individuals were sentenced to LWOP for nonhomicide offenses in 12 states, the vast majority were serving their sentences in Florida and Louisiana. Drawing conclusions about the outcomes of resentencing hearings is difficult because there is no comprehensive analysis of the outcomes available and many cases have still not been resentenced.

84. *People v. Caballero*, 55 Cal. 4th 262 (Cal. 2012).

85. *Id.* at 273 (citing *Graham*, 130 S. Ct. at 2030).

Similar challenges to virtual or de facto LWOP sentences have cropped up across the country, with . . . varying outcomes.

“*Graham’s* ban on life without parole sentences does not apply to juvenile offenders who commit attempted murder, with its requisite intent to kill,” as well as the state’s view “that a cumulative sentence for distinct crimes does not present a cognizable Eighth Amendment claim”⁸⁶ The Court relied on the clarification of the

Graham decision provided by the United States Supreme Court in *Miller* to hold that “*Graham’s* ‘flat ban’ on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including [a] term-of-years sentence that amounts to the functional equivalent of a life without parole sentence”⁸⁷

Unlike *Graham*, the *Caballero* decision does not categorically prohibit the possibility of incarcerating juveniles for the rest of their lives. Instead, drawing from the language of *Graham* and *Miller*, the decision recognizes that “the state may not deprive [juveniles] at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future.”⁸⁸ With regard to procedure, the California Court declined to implement specific sentencing guidelines for those wishing to challenge their LWOP or de facto life sentences going forward.⁸⁹ Rather, the court ordered that juvenile lifers “may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings.”⁹⁰ It will then be up to the parole board to determine if and when the juvenile will be released from prison.

Similar challenges to virtual or de facto LWOP sentences have cropped up across the country, with different procedural postures and with varying outcomes. In *Bunch v. Smith*, the

Sixth Circuit Court of Appeals considered a case involving a 16-year-old who was convicted of robbing, kidnapping, and raping a young woman and was sentenced to consecutive, fixed terms totaling 89 years’ imprisonment.⁹¹

Operating under a very different standard of review from its state-court counterparts, the *Bunch* court’s analysis was guided by the Antiterrorism and Effective Death Penalty Act of 1996, which permits federal courts to grant relief on a habeas petition only where the state court has ruled in a way that is either contrary to, or an unreasonable application of, clearly established federal law.⁹² Here, the *Bunch* court held that the Ohio Supreme Court was not unreasonable in finding *Graham* to be inapplicable on the facts. Specifically, the *Bunch* court held that *Graham* “does not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole.”⁹³ The court employed a narrow reading of the *Graham* decision, arguing that although “*Bunch’s* 89-year aggregate sentence may end up being the functional equivalent of life without parole,”⁹⁴ *Graham* is inapplicable because “[the *Graham*] Court did not . . . consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment’s prohibition on cruel and unusual punishments.”⁹⁵ Notably, the *Bunch* court concluded its opinion by noting that this is not an established area of law:⁹⁶

[C]ourts across the country are split over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant’s life expectancy. Some courts have held that such a sentence is a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham*.⁹⁷ Other courts, however, have rejected the de facto life sentence argument, holding that *Graham* only applies to juvenile nonhomicide offenders expressly sentenced to ‘life with-

86. *Id.* The Court also rejected the argument that “each of defendant’s sentences was permissible individually because each included the possibility of parole within his lifetime.” The Court disagreed with the state’s reading of *Lockyer v. Andrade* “that a juvenile offender may receive consecutive mandatory terms exceeding his or her life expectancy without implicating the prohibition against cruel and unusual punishment,” finding instead that “the high court noted that it has never provided specific guidance ‘in determining whether a particular sentence for a term of years can violate the Eighth Amendment,’ observing that it had ‘not established a clear or consistent path for courts to follow.’” *Id.* at n. 3 (citing *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)).

87. *Id.* at 273 (citing *Miller*, 132 S. Ct. at 2465, 2469).

88. *Id.*

89. *See id.* (“Because every case will be different, we will not provide trial courts with a precise time frame for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant’s Eighth Amendment rights and must provide him or her a ‘meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation’ under *Graham’s* mandate.”).

90. *Id.*

91. 685 F.3d 546 (6th Cir. 2012), *petition for cert. filed* (U.S. Nov. 5, 2012) (No. 12-558).

92. *See* 28 U.S.C. § 2254(d)(1) (2006) (“(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court.”).

93. *Id.* at 547.

94. *Id.* at 551.

95. *Id.* at 552.

96. It is worth noting that *Caballero*, 55 Cal. 4th 262, was decided after *Bunch*, providing further support for the proposition that *Graham* is applicable to virtual juvenile LWOP sentences.

97. Citing, e.g., *People v. J.I.A.*, 196 Cal. App. 4th 393, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011); *People v. Nuñez*, 195 Cal. App. 4th 414, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. App. 2011).

out parole.⁹⁸ This split demonstrates that *Bunch's* expansive reading of *Graham* is not clearly established.⁹⁹

In light of the split regarding *Graham's* applicability to de facto LWOP sentences, the United States Supreme Court's treatment of similar cases on petitions for certiorari may provide insight on the proper reading of *Graham*. Consider the recent case from Wyoming of Wyatt Bear Cloud, a 16-year-old convicted of second-degree murder and sentenced to life in prison with the possibility of parole. In challenging his case on both *Graham* and *Miller* grounds, Bear Cloud argued that "although [he] wasn't sentenced to serve life without parole . . . that was the practical effect of his sentence because his only chance for release was commutation by a state governor."¹⁰⁰ The Wyoming Supreme Court found that "Bear Cloud is afforded the possibility of parole. Rehabilitation and even release are still possible. Accordingly, his sentence does not constitute cruel or unusual punishment in contravention of Wyoming's constitution."¹⁰¹ But the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Miller*.¹⁰²

Caballero provides a strong example of state courts embracing and reaffirming both the letter and spirit of the *Graham* decision by acknowledging the unique attributes of youth and the necessary consideration of these attributes when it comes to sentencing children as adults. Unlike *Caballero*, cases like *Bunch* provide only a narrow reading of the precedent and refuse to fully adopt *Graham's* mandate that children "are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."¹⁰³ Although not yet concluded, the current posture of *Bear Cloud* gives some indication that merely providing a choice between "life with" or "life without" parole for juvenile nonhomicide offenders fails to comply with the directives of both the *Graham* and *Miller* decisions.

MILLER IMPLEMENTATION IN PENNSYLVANIA: RESPONSES BY THE COURTS AND LEGISLATURE

At the time *Miller* was decided, 26 states had sentencing provisions mandating juvenile LWOP sentences for certain categories of offenses, and making such sentences applicable to 14 year-olds.¹⁰⁴ Of those 26 states, Pennsylvania has the highest number of people serving the sentence, with nearly 500 men and women who were incarcerated throughout the state as children. Prior to *Miller*, Pennsylvania held the distinction of mandating life imprisonment sentences for all first- and second-degree murder convictions,¹⁰⁵ regardless of the age of the defendant.¹⁰⁶ Finally, Pennsylvania is unique in that it has an extraordinarily short time frame—60 days—for filing a petition for post-conviction relief based on a new rule of constitutional law.¹⁰⁷ This means that Pennsylvania courts are among the first in the country to consider *Miller* implementation. For all of these reasons, Pennsylvania serves as a battleground for determining how state-based implementation of the *Miller* decision will look. Using Pennsylvania as a case study in this context will help to forecast the challenges other states may face in implementing *Miller*, as well as the avenues they may wish to avoid or pursue.

After *Miller* was decided, the Pennsylvania Supreme Court has heard arguments in two juvenile LWOP cases. At the time of this writing, the cases remain undecided. In the first case, *Commonwealth v. Batts*,¹⁰⁸ the Court (on direct appeal) is tasked with deciding the appropriate sentence for a 16-year-old convicted of first-degree murder, in light of the *Miller* decision and the mandatory nature of the state's sentencing scheme. In *Commonwealth v. Cunningham*,¹⁰⁹ a second-degree murder case

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98. See, e.g., *Henry v. State*, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012); *State v. Kasic*, 228 Ariz. 228, 265 P.3d 410, 415 (Ariz. Ct. App. 2011).

99. *Bunch*, 685 F.3d at 552.

100. Associated Press, "US Supreme Court Sets Aside Wyoming Teen's Sentence," Oct. 26, 2012, available at http://billingsgazette.com/news/state-and-regional/wyoming/us-supreme-court-sets-aside-wyoming-teen-s-sentence/article_127c206e-d7c9-5d67-8280-17ec288174a0.html#ixzz2AkYpdo00.

101. *Bear Cloud v. State*, 2012 WY 16, P84 (Wyo. 2012).

102. See *Bear Cloud v. Wyoming*, 184 L. Ed. 2d 5 (U.S. 2012) ("On petition for writ of certiorari to the Supreme Court of Wyoming. Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Wyoming for further consideration in light of *Miller v. Alabama*, 567 U.S. ___, [132 S. Ct. 2455, 183 L. Ed. 2d 407] (2012)").

103. *Graham*, 130 S. Ct. at 2032 (citing *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

104. See *Miller*, 132 S. Ct. at 2471, n. 9 ("26 States and the Federal Government make life without parole the mandatory (or manda-

tory minimum) punishment for some form of murder, and would apply the relevant provision to 14-year-olds (with many applying it to even younger defendants). In addition, life without parole is mandatory for older juveniles in Louisiana (age 15 and up) and Texas (age 17). See LA. CHILD. CODE ANN., Arts. 857(A), (B) (West Supp. 2012); LA. REV. STAT. ANN. §§ 14:30(C), 14:30.1(B) (West Supp. 2012); TEX. FAMILY CODE ANN. §§ 51.02(2)(A), 54.02(a)(2)(A) (West Supp. 2011); TEX. PENAL CODE ANN. § 12.31(a) (West 2011). In many of these jurisdictions, life without parole is the mandatory punishment only for aggravated forms of murder.").

105. See 18 Pa. Cons. Stat. Ann. § 1102(b) (mandating life sentence for second-degree conviction); 61 Pa. Cons. Stat. Ann. § 6137 (removing parole eligibility from murder statute).

106. See 42 Pa. Cons. Stat. Ann. § 6302 (omitting the "crime of murder" from the definition of delinquent acts that are handled in juvenile court).

107. See 42 Pa. Cons. Stat. Ann. § 9545(b)(2).

108. Docket No. 79 MAP 2009.

109. Docket No. 38 EAP 2012.

After *Miller* was decided, the Pennsylvania Supreme Court has heard arguments in two juvenile LWOP cases.

on collateral review, the Court must squarely confront the issue of retroactivity, determining whether *Miller*'s mandate applies to all of the men and women in the state who were sentenced as juveniles and are currently serving life sentences without the possibility of parole.

COMMONWEALTH V. BATTS

Qu'eed Batts was convicted of first-degree murder, attempted murder, and aggravated assault for his role in a gang-related shooting of two individuals in Easton, Pennsylvania. Batts's appeal was argued before the Supreme Court of Pennsylvania in the winter of 2010 and then held in abeyance pending the United States Supreme Court's grant of certiorari in the *Miller* and *Jackson* cases. Once *Miller* was decided in the summer of 2012, the Pennsylvania Supreme Court ordered supplemental briefing on the decision's potential impact on the pending case.¹¹⁰ Both sides agreed that because the *Miller* decision invalidated Pennsylvania's statutory sentencing scheme (mandating LWOP for any juvenile convicted of first- or second-degree murder), Batts was entitled to a resentencing hearing. Therefore, the question at issue is what the new constitutional sentence should be.

Batts argued that the Court must look to existing statutes to determine what constitutional sentence may be imposed on juveniles convicted of homicide.¹¹¹ Batts further argued that with *Miller*'s invalidation of the existing sentencing scheme, the only constitutionally available sentence in Pennsylvania is the sentence for the lesser-included offense of third-degree murder, carrying a maximum term of 40 years.¹¹² Accordingly, in the absence of alternate legislation to be applied retroactively, Batts seeks to be resentenced pursuant to the Commonwealth's third-degree murder statute.¹¹³

The Commonwealth of Pennsylvania argued that the only relief afforded to Batts by the *Miller* decision is a resentencing hearing, at which he can still be sentenced to life in

prison without parole.¹¹⁴ Specifically, the Commonwealth argued that "[t]he trial court has discretion as to whether to impose a sentence to life in prison without parole, or a sentence of life in prison with the possibility of parole."¹¹⁵ Underlying the Commonwealth's argument is the notion that juveniles do not deserve special treatment; rather, murder should be treated "as a special category of violence that cannot be categorically excused or mitigated by youthful impetuosity."¹¹⁶

COMMONWEALTH V. CUNNINGHAM

Ian Cunningham was convicted of second-degree murder for the role he played in an armed-robbery-turned-murder. Once convicted, Cunningham sought collateral relief on the basis of the changes in law as announced in *Roper*. The Pennsylvania Superior Court denied relief, holding that *Roper* had no bearing on life sentences.¹¹⁷ Soon after the Superior Court denied relief, Cunningham filed a petition for allowance of appeal in the Pennsylvania Supreme Court. The Court reserved the petition pending the disposition of *Batts*. As in *Batts*, following the United States Supreme Court's announcement of its decision in *Miller*, the Pennsylvania court issued a limited allowance of appeal to address the extent to which *Miller* applies on collateral review. The court heard oral argument on this issue in September 2012.

Cunningham puts forward a number of arguments in support of his petition for relief. First, Cunningham challenges the applicability of a felony-murder charge to a juvenile offender. Relying on research regarding adolescent brain development, Cunningham argues that it is not possible to infer intent for felony-murder purposes when dealing with a teenage defendant. Second, Cunningham argues that prisoners convicted of first- or second-degree murder before the *Miller/Jackson* decisions are eligible for relief even after they have exhausted their direct-appeal rights, relying in large part on the fact that the *Miller* decision was held to apply to *Jackson* on collateral review. Cunningham goes on to argue that if *Miller/Jackson* relief is applied retroactively, courts at resentencing must look to the statutes in existence at the time of the offense to determine what constitutional sentence may be imposed. In

110. Specifically, the Pennsylvania high court ordered briefing on the following questions: "(1) What is, as a general matter, the appropriate remedy on direct appeal in Pennsylvania for a defendant who was sentenced to a mandatory term of life imprisonment without the possibility of parole for a murder committed when the defendant was under the age of eighteen?; (2) To what relief, if any, is appellant entitled from the mandatory term of life imprisonment without parole for the murder he committed when he was fourteen years old?" Docket No. 79 MAP 2009.

111. See Supplemental Brief of Appellant at 7-8, *Batts*, Docket No. 79 MAP 2009.

112. See *id.* at 8 ("juvenile offenders convicted of first degree murder should be resentenced in accordance with the sentencing scheme for the lesser-included offense of third degree murder, which carries a maximum term of 40 years.") (citing 18 PA. CONS. STAT. ANN. § 1102). See also *Rutledge v. United States*, 517 U.S. 292, 305-307 (1996) (finding that where a greater offense must be reversed, courts may enter judgment on the lesser included

offense); *Commonwealth v. Story*, 497 Pa. 273, 275 (1981) (imposing life imprisonment, the next most severe punishment under Pennsylvania law, upon invalidation of mandatory death-penalty statute as unconstitutional); *Commonwealth v. Bradley*, 449 Pa. 19, 23-24 (1972) (vacating death sentence and imposing life imprisonment as next most severe constitutionally available sentence); *Commonwealth v. Edwards*, 488 Pa. 139, 141 (1979) (same).

113. See Supplemental Brief of Appellant, *supra* note 109, at 12.

114. See Supplemental Brief of Appellee at 7, *Batts*, Docket No. 79 MAP 2009 ("A sentence of life in prison without parole simply requires a discretionary decision based on individualized consideration.").

115. *Id.* at 8.

116. *Id.* at 10 (citing *Commonwealth v. Williams*, 522 A.2d 1058, 1063 (Pa. 1987)).

117. See Supplemental Response Brief of District Attorney at 4, *Cunningham*, Docket No. 38 EAP 2012.

Pennsylvania, courts at resentencing should only consider lesser-included offenses, which, in the case of felony murder, includes only the underlying felonies.

The Commonwealth argues that *Miller* states a new rule and is therefore “not a basis for relief on collateral review.”¹¹⁸ The Commonwealth further argues that *Miller* does not meet the exceptions required by the Supreme Court’s decision in *Teague v. Lane*,¹¹⁹ to be given retroactive application. Specifically, the rule announced by *Miller* does not meet the exception of being either a “substantive” rule or “watershed rule” of criminal procedure,¹²⁰ but, according to the Commonwealth, only “impos[es] a process, [and] is restricted to the manner in which the penalty is determined and has no bearing on the accuracy of the conviction.”¹²¹ The Commonwealth rejects Cunningham’s argument that *Miller* applies retroactively on collateral review merely because the decision was held to apply to Jackson.¹²² Finally, the Commonwealth rebuffs Cunningham’s argument that juvenile defendants convicted of second-degree murder should be resentenced pursuant to the sentences available for the underlying felonies. Instead, the Commonwealth argues, “On remand in such a case a sentencing court would have the power to allow or not allow parole, and to define a minimum term that would initiate parole eligibility.”¹²³

BATTS AND CUNNINGHAM: FUTURE IMPLICATIONS

The opposing arguments presented by the petitioners and Commonwealth in *Batts* and *Cunningham* largely portray the range of outcomes available to state courts as they work to implement *Miller*’s mandate. Speculation as to the relative merits of the arguments presented in the two cases serves a limited purpose. Instead, by combining the arguments presented by *Batts* and *Cunningham* with additional analysis on the issue of retroactivity and the role of sentencing legislation, the foundation is laid for a comprehensive understanding of the myriad issues to consider in developing a thoughtful post-*Miller* analysis.

THE QUESTION OF RETROACTIVITY

There is currently no definitive authority that specifically addresses whether or not *Miller* applies retroactively to cases on collateral review. In Pennsylvania, *Cunningham* will likely serve this purpose. The competing sides of the argument are well summarized by Professor Chemerinsky:

There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It also would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial. On the other hand, if *Miller* is seen as just requiring a new procedure—a penalty phase before a sentence of life without parole is imposed for a crime committed by a juvenile—then it is unlikely to be applied retroactively. Procedural changes rarely apply retroactively.¹²⁴

There is currently no definitive authority that specifically addresses whether or not *Miller* applies retroactively to cases on collateral review.

However, he concludes, “the *Miller* court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government’s power, the holding should apply retroactively.”¹²⁵ Chemerinsky’s apt conclusion has considerable support.¹²⁶ The new rule announced by the *Miller* decision was held to apply to both Evan Miller on direct appeal and Kuntrell Jackson on collateral review. Presumably, if *Miller* did not apply retroactively to cases on collateral review, Jackson would have been barred from the relief he was granted.

118. See Brief of Appellee at 2, *Cunningham*, Docket No. 38 EAP 2012. 119. 489 U.S. 288.

120. See *id.* at 12-13 (citing *Teague*, 489 U.S. 288) (“[U]nder the first *Teague* exception, new rules do not apply on collateral review unless they are ‘substantive’” and the second *Teague* exception only applies to “‘watershed rules’ of criminal procedure ‘implicating the fundamental fairness and accuracy of the criminal proceeding.’”).

121. *Id.* at 14.

122. See *id.* at 5 (“That one of the appellants in *Miller*, Jackson, was on collateral review is additionally irrelevant because *Miller* did not apply its new rule to Jackson (or even to Miller), but only remanded for further proceedings—in which the state could raise a valid *Teague* objection.”).

123. *Id.*

124. See Chemerinsky, *supra* note 78 (“In fact, the Supreme Court held that *Ring* [*v. Arizona*] did not apply retroactively. In 2004’s *Schriro v. Summerlin*, the court concluded that *Ring* was a procedural change and not a ‘watershed’ rule of criminal procedure that warranted retroactive application”). For cases finding that

Miller does not apply retroactively on collateral review, see *Craig v. Cain*, 2013 WL 69128, at *2, 2013 U.S. App. Lexis 431, at *4-5 (5th Cir. Jan. 4, 2013) (unpublished opinion) (“*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme.”); *People v. Carp*, ___ N.W.2d ___, 2012 WL 5846553, 2012 Mich. App. Lexis 2270 (Mich. Ct. App. Nov. 15, 2012) (“*Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review . . .”); *Geter v. State*, ___ So.3d ___, 2012 WL 4448860, 2012 Fla. App. Lexis 16051 (Fla. Dist. Ct. App. 2012).

125. Chemerinsky, *supra* note 78.

126. See, e.g., *People v. Williams*, 2012 Ill. App. (1st) 111145, 2012 WL 6206407, 2012 Ill. App. Lexis 1002 (Ill. App. Ct. 2012) (“The *Miller* case held under the Eighth Amendment that it is cruel and unusual punishment to impose a mandatory life sentence without parole to a special class—juveniles. It would also be cruel and unusual to apply that principle only to new cases. We therefore hold that the Court’s holding in *Miller* should be

Because cases under both lines of precedent have been applied retroactively . . . , it follows that *Miller* should receive the same retroactive application.

Under the Court's prior ruling in *Tyler v. Cain*,¹²⁷ and because the *Miller* Court reversed Jackson's sentence, a strong argument can be made that the ban on mandatory LWOP is retroactive. Specifically, in *Miller*, the majority relies on two lines of precedent that have largely been held to apply retroactively themselves.¹²⁸

As discussed above in the explication of the *Miller* decision, the first line of cases relied on by the Court adopted categorical bans on sentencing schemes where the severity of the punishment far outweighed the blameworthiness of a class of offenders.¹²⁹ The second line of cases consists of those requiring individualized sentencing hearings with consideration of mitigating factors before a sentence of death may be imposed.¹³⁰ Because cases under both lines of precedent have been applied retroactively on collateral and direct review, it follows that *Miller* should receive the same retroactive application. Finally, the *Miller* dissent specifically bemoans the majority's invalidation of over 2,000 cases.¹³¹ The dissent would not have raised such a concern if the Court's new ruling did not apply retroactively.

LEGISLATIVE FIXES—THE PENNSYLVANIA STORY

In the wake of the *Miller* decision, state courts were left with

little guidance on implementation. In states like Pennsylvania, the decision invalidated an entire statutory sentencing provision, leaving no sentence on the books for youth under 18 convicted of first- or second-degree murder. Pennsylvania is primed to serve as a case study not only in the litigation context, as described above, but also in terms of its legislative reaction to *Miller*.

Responding to uncertainty among the lower courts, the Pennsylvania legislature acted hastily. The chair of the senate judiciary committee convened a hearing approximately three weeks after the *Miller* decision was issued.¹³² The legislature then convened a truncated three-week-long session in September 2012, during which a number of legislative amendments were introduced. One of these amendments, to Senate Bill 850, sought to overhaul the first- and second-degree murder sentencing schemes for juveniles, in direct response to *Miller*. The amended bill provides for the following revised sentencing scheme:

For first degree murder, either: life without the opportunity for parole; or 35 years to life for individuals who were 15 to 17 years old at the time of the offense or 25 years to life for those who were 14 or younger at the time of the offense. For second degree murder: 30 years to life for youth who were 15 to 17 years old at the time of the offense and 20 years to life for youth who were 14 or under at the time of the offense. Parole hearings are only guaranteed to occur every five years following completion of the minimum term of years.¹³³

retroactively applied.”); *People v. Morfin*, 2012 Ill. App. (1st) 103568, 2012 WL 6028634, 2012 Ill. App. Lexis 977 (Ill. App. Ct. 2012) (“*Miller* creates a new rule of law that was not required by either the precedents on what penalties a minor constitutionally cannot receive (*Roper* and *Graham*) or by the cases cited in *Miller* requiring sentencing discretion for the death penalty.”); *State v. Simmons*, 99 So.3d 28 (La. 2012) (finding *Miller* to apply retroactively to a case where crime was committed in 1995); see also *People v. Hoffman*, 2012 WL 3066392, 2012 Cal. App. Unpub. Lexis 5574 (Cal. Ct. App. July 30, 2012) (unpublished opinion); *Iowa v. Lockheart*, 2012 WL 2814378 (Iowa Ct. App. 2012) (unpublished opinion) (remanding for resentencing in accord with *Miller* without employing the *Teague* analysis). Support for *Miller*'s retroactivity also exists in light of the retroactive application of *Graham*, which has been treated differently in state courts across the country. The U.S. Supreme Court has not spoken on the matter. For cases finding *Graham* to apply retroactively, see, e.g., *Louisiana v. Skipper*, 2011 WL 2448013 (La. App.); *Bonilla v. State*, 791 N.W. 2d. 697 (Iowa 2010). For the opposing viewpoint, see, e.g., *Selectman v. Zavaras*, 2011 WL 1597678 (D. Colo. 2011); *Trimble v. Triani*, 2011 WL 3426207 (D. Colo. 2011). At the time of this writing, only one federal circuit court had addressed the issue. See *In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (finding *Graham* to apply retroactively).

127. 533 U.S. 656, 663 (2001) (“The new rule becomes retroactive, not by the decisions of the lower court, or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court”). See also *Teague*, 489 U.S. at 300 (“[O]nce a new rule is applied to a defendant in the case announcing the new rule, evenhanded justice requires that it be

applied retroactively to all who are similarly situated.”).

128. See note 126, *supra* (considering the retroactive application of the *Graham* decision). In *In re Sparks*, the Fifth Circuit Court of Appeals found, “By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*.” *Sparks*, 657 F.3d at 260 (citing *Tyler*, 533 U.S. 656, n. 31).

129. See *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of mentally retarded offenders); *Roper*, 543 U.S. 551 (outlawing the death penalty for juvenile offenders); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (banning LWOP sentences for juveniles convicted of nonhomicide offenses).

130. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 483 U.S. 586 (1978); *Eddings v. Oklahoma*, 436 U.S. 921 (1978), and *Sumner v. Shuman*, 483 U.S. 66 (1987).

131. See *Miller*, 132 S. Ct. at 2480 (Roberts, C.J., dissenting).

132. The hearing, convened by Senator Stewart Greenleaf on July 12, 2012, allowed for testimony from stakeholders on all sides of the issue. See Matt Stroud and Liliana Segura, *The Uncertain Fate of Pennsylvania's Juvenile Lifers*, THE NATION, Aug. 7, 2012, <http://www.thenation.com/article/169268/uncertain-fate-pennsylvanias-juvenile-lifers#> (“The hearing featured testimony from twenty-six people—none of them prisoners—who advocate for organizations, litigate juvenile cases or are otherwise involved in the juvenile lifer debate”).

133. See Pennsylvania General Assembly, “Bill Information, Regular Session 2011-2012, Senate Bill 850,” available at <http://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?year=2011&sind=0&body=S&type=B&bn=850>.

The amendments garnered support among prosecutors and victims' advocates.¹³⁴ While child advocates and families and supporters of juvenile lifers applauded the removal of LWOP as a sentencing option for those convicted of second-degree murder, they strongly criticized the legislature for failing to take a measured and thoughtful approach to one of the most substantive changes to this area of the sentencing statute in nearly a century. Opponents disagreed with leaving LWOP on the table for first-degree murder and argued the mandatory minimums were at odds with the directives of *Miller*, which calls for an individualized approach to juvenile sentencing, taking into account the transitory nature of youth.¹³⁵ With little time for opponents to mount an organized campaign against the proposed legislation, the Bill passed on concurrence by a vote of 37 to 12. Notably, the vote was not split across party or geographic lines. Representatives on both sides of the aisle voiced discontent with the way the legislation was pushed through the process.¹³⁶ The Bill was signed into law by Governor Corbett on October 25, 2012.¹³⁷

The interplay between the legislature's actions and the pending Pennsylvania Supreme Court decisions in *Batts* and *Cunningham* is complex on a number of levels. First, the legislature failed to address the issue of *Miller*'s retroactivity and what is to become of the nearly 500 men and women who are currently serving illegal sentences, leaving the issue for the state's highest court to address in *Cunningham*. Second, the legislature can enact future laws to circumvent the high court's pending rulings in *Batts* and *Cunningham*. Third, advocates may mount constitutional challenges to the form and substance of the current legislation, thereby sending the issues back to the Pennsylvania Supreme Court for consideration.

OTHER APPROACHES—NORTH CAROLINA, CALIFORNIA, AND IOWA

To date, only a handful of other states have taken on the

task of amending their laws in accordance with *Miller*. In North Carolina, outgoing Governor Bev Perdue signed into law an amendment to the state sentencing laws on first-degree murder to comply with *Miller*.¹³⁸ Under the new law, "life with parole" means that defendants will be eligible for parole at 25 years imprisonment and that parole will be a

term of 5 years.¹³⁹ Further, juveniles convicted under the felony-murder doctrine are afforded a life-with-parole sentence. The law also outlines the hearing procedure to determine whether the juvenile's sentence should be life with or without parole, and specifies the mitigating factors to be considered by the court at such a hearing.¹⁴⁰

California's approach reflects a progressive view on juvenile sentencing. Following a legislative campaign that was put into place well before the *Miller* decision was announced, the governor recently signed into law SB9,¹⁴¹ which grants juvenile offenders sentenced to life in prison without parole that have served at least 15 years the chance to petition for a new sentence. The courts would then have the ability to lower their sentence to 25 years to life if the juvenile offenders demonstrate remorse and work toward rehabilitation.¹⁴²

Iowa, on the other hand, provides an example of a conservative non-participatory approach. Instead of allowing the legislative process to take its course, the governor of Iowa used his executive privilege to commute life sentences for 38 prisoners sentenced to juvenile LWOP to mandatory 60-year sentences, acquiring a good deal of national attention and derision as a result. While the Iowa Code seems to give the governor this power without limitation, an open question will be

To date, only a handful of other states have taken on the task of amending their laws in accordance with *Miller*.

134. See, e.g., Pennsylvania District Attorneys Association, *Press Release: District Attorneys Praise PA Legislature for End of Session Criminal Justice Focus*, 19 Oct. 2012, available at http://www.pdaa.org/index.php?option=com_content&view=article&id=154:district-attorneys-praise-pa-legislature-for-end-of-session-criminal-justice-focus&catid=48:press-pdaa&Itemid=64 ("The Pennsylvania District Attorneys Association (PDAA) praised the Pennsylvania State Senate and House of Representatives for using their final session days to focus on criminal justice and public safety matters The new laws provide appropriate sentences for juveniles convicted of murder. . . .").

135. See, e.g., Antonio Ginatta, *US/Pennsylvania: Don't Codify Excessive Sentences for Children Letter to Pennsylvania Governor Tom Corbett*, HUMAN RIGHTS WATCH, Oct. 19, 2012, <http://www.hrw.org/news/2012/10/19/uspennsylvania-dont-codify-excessive-sentences-children> ("There is no doubt that thoughtful, informed sentencing reform is needed in Pennsylvania. Senate Bill 850 is neither thoughtful nor sufficiently informed.").

136. See Pennsylvania General Assembly, *Floor Roll Call, Bill Information, Regular Session 2011-2012, Senate Bill 850*, available at http://www.legis.state.pa.us/cfdocs/billinfo/bill_votes.cfm

[syear=2011&sind=0&body=S&type=B&bn=850](http://www.legis.state.pa.us/cfdocs/billinfo/bill_votes.cfm?year=2011&sind=0&body=S&type=B&bn=850).

137. See ASSOCIATED PRESS, *Corbett Signs Juvenile Murder Sentence Legislation*, Oct. 26, 2012, available at <http://www.philly.com/philly/news/pennsylvania/175897601.html>.

138. See Senate Bill 635/S.L. 2012-148, "Minors/Sentencing for First Degree Murder."

139. See Juvenile Justice Blog, *States Respond to Supreme Court JLWOP Decision*, July 19, 2012, <http://juvenilejusticeblog.web.unc.edu/2012/07/17/states-respond-to-supreme-court-jlwop-decision/>.

140. The mitigating factors to be considered by the sentencing court include: age at the time of the offense, immaturity, ability to appreciate the risks and consequences of the conduct, intellectual capacity, prior record, mental health, familial or peer pressure exerted upon the defendant, and likelihood that the defendant would benefit from rehabilitation in confinement. See note 138, *supra*.

141. CA Senate Bill 9, available at <http://legiscan.com/gaits/text/665299>.

142. See, e.g., Patrick McGreevy, *Jerry Brown OKs Appeal for Minors Sentenced to Life Without Parole*, LA TIMES, Sept. 30, 2012, <http://latimesblogs.latimes.com/california-politics/2012/09/gov-jerry-brown-approves-appeal-for-minors-sentenced-to-life-without-parole.html>.

whether 60-year sentences are functionally “life” sentences, given that these prisoners were at least 13 or 14 at the time of the offense.¹⁴³

CONCLUSION

Over the last decade, the Supreme Court has laid out a clear rationale for punishing juveniles differently than adults and has used this framework, in large part, to ban specific punishments for young people. These decisions are not only supported by prior precedent and common-sense judgment, but also by substantial research from the social and medical sciences as well as the overwhelming consensus of the world community. Courts and legislatures will continue to grapple with these decisions as they seek to directly implement the *Graham* and *Miller* holdings and consider how these decisions might apply to other sentences for juveniles.

Discussions regarding the appropriate implementation of these decisions will dominate the dialogue on juvenile justice for years to come. In these discussions, it is essential that advocates and lawmakers be loyal to the true letter and spirit of the *Miller* decision. State actors must develop and implement comprehensive reforms to their statutory sentencing schemes, rather than surface solutions merely removing the word “mandatory” from otherwise harsh options not in line with *Miller*’s directive. Enacting sentencing schemes that require sentences of 60, or even 35 years before a young person is eligible for parole are examples of the type of reaction that might technically comply with the letter but not the spirit of the *Graham* and *Miller* decisions.

Comprehensive reform must also focus not merely on juveniles serving long sentences. As discussed previously, the vast majority of young people in the criminal justice system do not receive long sentences, and the evidence indicates that the policies that have facilitated the increased transfer of young people have failed. This means that legislatures and courts

must revisit the purpose of transferring juveniles to the criminal court and determine whether mechanisms that do so are actually distinguishing between those who should be transferred and those who should not. Consideration of this question must move beyond charged rhetoric concerning the dangerousness of young people and focus on the framework laid out by the Court in *Roper*, *Graham*, and *Miller*. Doing so will not only benefit young people, but will also serve public safety and ensure that we are utilizing financial and other resources appropriately.



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143. Doug Berman, *Iowa Gov Uses Clemency Power to Devise (Astute? Sinister?) Response to Miller for Juvenile LWOPers*, SENTENCING LAW AND POLICY BLOG, July 16, 2012, [http://sentencing.type-](http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/iowa-gov-uses-clemency-power-to-devise-astute-sinister-response-to-miller-for-juve-lwopers.html)

[pad.com/sentencing_law_and_policy/2012/07/iowa-gov-uses-clemency-power-to-devise-astute-sinister-response-to-miller-for-juve-lwopers.html](http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/iowa-gov-uses-clemency-power-to-devise-astute-sinister-response-to-miller-for-juve-lwopers.html).

AMERICAN JUDGES ASSOCIATION FUTURE CONFERENCES

2013 Midyear Meeting
Orlando, Florida
Wyndham Lake Buena Vista
May 2-4
\$99 single/double

2013 Annual Conference
Kohala Coast, Hawaii
The Fairmont Orchid
September 22-27
\$219 single/double

2014 Midyear Meeting
TBD

2014 Annual Conference
Las Vegas, Nevada
Dates and Hotel TBD

2015 Midyear Meeting
TBD

2015 Annual Conference
Seattle, Washington
Sheraton Seattle
October 4-7
\$189 single/double

Achieving Racial and Ethnic Fairness in Drug Courts

Douglas B. Marlowe

In June 2010, the Board of Directors of the National Association of Drug Court Professionals (NADCP) passed a unanimous resolution directing drug courts to examine whether unfair disparities exist in their programs for racial or ethnic minority participants, and if so, to take reasonable corrective measures to eliminate such disparities.¹ The resolution places an affirmative obligation on drug courts to continuously monitor whether minority participants have equal access to the programs, receive substantially equivalent services in the programs, and successfully complete the programs at equivalent rates to non-minorities.² The resolution further directs drug courts to adopt evidence-based assessment tools and clinical interventions that are scientifically proven to be valid and effective for minority participants, and to instruct staff members to attend up-to-date training events on the provision of culturally sensitive and culturally proficient services.³

As a professional membership and training organization, the NADCP has no enforcement authority over drug courts, which are typically governed by the administrative office of the courts, Supreme Court, or attorney disciplinary board in each state or territory. However, the NADCP is widely regarded as a leading national organization on best practices and evidence-based practices in drug courts, and its word carries considerable weight in the field. When the NADCP speaks definitively on an issue such as this, practitioners, policymakers, and funding agencies may come to view the recommendations as indicative of appropriate standards of practice for drug courts.

This article provides a backdrop to the NADCP Board

Resolution and reviews what is currently known, and not yet known, about racial-and-ethnic-minority impacts in drug courts. After briefly describing what drug courts are and why they came to be, research is presented on minority access to drug courts, the services received by minorities in drug courts, and the outcomes produced. Virtually all of the empirical research to date has focused on African-American participants and those of Hispanic and Latino/Latina ethnicity. This is largely due to the fact that these groups have been represented in sufficient numbers in many studies for evaluators to conduct separate analyses on their behalf. Additional efforts are needed to examine drug-court impacts on other racial and ethnic minority groups.

I. DRUG COURTS

The “War on Drugs” of the 1980s emphasized incarceration as a principal response to drug-related crime. It is now evident that this policy had a minimal effect on criminal recidivism,⁴ was prohibitively costly,⁵ and disproportionately harmed racial and ethnic minorities and the poor.⁶ Nearly one out of every 100 adult citizens is now behind bars in the United States,⁷ and the rates are substantially higher for minorities: approximately one out of every 15 African-American adult males and one out of every 36 Hispanic adult males are behind bars.⁸

Drug courts emerged as one alternative to the War on Drugs that emphasizes community-based treatment and rehabilitation in lieu of prosecution or incarceration.⁹ The drug-court judge leads a multidisciplinary team of professionals that commonly includes representatives from the prosecutor’s office,

Footnotes

1. NAT’L ASS’N DRUG CT. PROF., RESOLUTION OF THE BOARD OF DIRECTORS ON THE EQUIVALENT TREATMENT OF RACIAL AND ETHNIC MINORITY PARTICIPANTS IN DRUG COURTS, *available at* <http://www.nadcp.org/sites/default/files/nadcp/NADCP%20Board%20Resolution%20-%20The%20Equivalent%20Treatment%20of%20Racial%20and%20Ethnic%20Minority%20Participants%20in%20Drug%20Courts%2006-01-10.pdf> [hereafter NADCP MINORITY RESOLUTION].
2. *Id.* at 2.
3. *Id.* at 2-3.
4. See generally Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 381 (2010) (concluding incarceration had little effect on likelihood of re-arrest for drug offenders); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 346 (2002) (finding incarcerated drug offenders were more likely to recidivate than those sentenced to probation); Jonathan P. Caulkens & Sara Chandler, *Long-Run Trends in Incarceration in the United States*, 52 CRIME & DELINQ. 619, 630 (2006) (finding incarceration does not dramatically reduce drug use and is not cost-effective).

5. See PEW CTR. ON STATES, HIGH COST, LOW RETURN: DESPITE THE MASSIVE INCREASE IN THE SIZE AND COST OF AMERICA’S CORRECTIONAL SYSTEM, THE NATIONAL RECIDIVISM RATE REMAINS STUBBORNLY HIGH, *available at* http://www.pewstates.org/uploadedimages/PCS_Assets/Graphics/PSPP_infographic.png [hereinafter HIGH COST, LOW RETURN] (finding 1 in 14 state general fund dollars spent on corrections, totaling \$52 billion in 2011).
6. See generally E. L. Jensen et al., *Social Consequences of the War on Drugs: The Legacy of Failed Policy*, 15 CRIM. JUST. POL’Y REV. 100 (2004) (reviewing harmful impacts of War on Drugs on minorities and minority communities); Martin Y. Iguchi et al., *How Criminal System Racial Disparities May Translate into Health Disparities*, 16 J. HEALTH CARE FOR POOR & UNDERSERVED 48 (2005) (linking disproportionate confinement of minorities for drug offenses to severe health and mental-health impairments).
7. HIGH COST, LOW RETURN, *supra* note 5, at 1 (finding 1 in 104 American adults was behind bars in 2011); PEW CTR. ON STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008) [hereinafter ONE IN 100] (finding 1 in 100 American adults behind bars in 2008).
8. ONE IN 100, *supra* note 7, at 6.
9. See generally NAT’L ASS’N DRUG CT. PROF., DEFINING DRUG COURTS: THE KEY COMPONENTS (1997) (describing the core ingredients of and services delivered in drug courts).

defense bar, treatment agencies, case-management agency, and probation department. The team members meet frequently to review participants' progress and offer recommendations to the judge about suitable consequences to impose. The consequences may include desired rewards such as verbal praise, reduced supervision requirements, or token gifts; punitive sanctions such as verbal reprimands, community service, or brief intervals of jail detention; or adjustments to participants' treatment regimens. The consequences are typically administered during regularly scheduled status hearings in which the judge discusses the matter with the participant in open court. In pre-adjudication drug courts, the ultimate incentive is to have the criminal charge(s) dropped or withdrawn, and in post-adjudication drug courts the ultimate incentive is to avoid incarceration or reduce the length or conditions of probation.¹⁰

Several scientific meta-analyses¹¹ and a large-scale national study¹² have concluded that drug courts significantly reduce crime and return an average of more than \$2 in direct financial benefits to the criminal justice system for every \$1 invested.¹³ The success of adult drug courts has spawned a wide variety of other types of problem-solving courts, including juvenile drug courts, family drug courts, driving-while-impaired (DWI) courts, mental-health courts, and prisoner-reentry courts.¹⁴ Although research has not advanced nearly as much for these

newer programs as it has for adult drug courts, evidence is promising to support the effectiveness of several of the newer models.¹⁵

Almost from their inception, controversy has surrounded the question of what impacts, if any, drug courts might have on preexisting racial or ethnic disparities in the criminal justice system. Researchers and commentators have variably concluded that drug courts reduce disparities,¹⁶ exacerbate disparities,¹⁷ or that insufficient evidence exists to know what effects they may have.¹⁸ This confusion stems from at least two sources. First, many researchers have sorely neglected the issue. Most evaluations have not reported outcomes separately by race or ethnicity; and among those that have, few evaluators performed the type of detailed inquiry and analyses that are required to validly interpret the findings. For example, as will be discussed,¹⁹ when racial or ethnic differences have been detected, evaluators rarely sought to determine whether those

[C]ontroversy has surrounded the question of what impacts, if any, drug courts might have on preexisting racial or ethnic disparities in the criminal justice system.

10. See, e.g., David S. Festinger et al., *Expungement of Arrest Records in Drug Court: Do Clients Know What They're Missing?*, 5 DRUG CT. REV. 1, 5 (2005) (reviewing the legal benefits of successful graduation from drug court).

11. See generally Ojmarh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. CRIM. JUST. 60, 66 (2012) (concluding drug courts reduced crime by an average of 12%); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459, 479 (2006) (concluding drug courts reduced crime an average of 14-26%); Christopher T. Lowenkamp et al., *Are Drug Courts Effective: A Meta-Analytic Review*, 15 J. COMMUNITY CORRECTIONS 5, 8 (2005) (concluding drug courts reduced crime an average of 7.5%); JEFF LATIMER ET AL., CANADA DEPT. JUSTICE, *A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM?* 9 (2006) (concluding drug courts reduced crime an average of 14%); Deborah Koetzle-Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 JUST. Q. 493, 508 (2010) (concluding drug courts reduced crime an average of 9%); STEVE AOS ET AL., WASHINGTON ST. INST. PUB. POL'Y, *EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT* at 9, Table 4 (2006) (concluding drug courts reduced crime an average of 8%); U.S. GOV'T ACCOUNTABILITY OFF., *ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS* 19 (2011) (concluding drug courts significantly reduced crime by 6 to 26 percentage points).

12. See generally Michael Rempel et al., *The Impact of Adult Drug Courts on Crime and Incarceration: Findings From a Multi-Site Quasi-Experimental Design*, J. EXPERIMENTAL CRIMINOLOGY, available at DOI: 10.1007/s11292-012-9143-2 (finding probability of re-offending reduced by almost one quarter in national study of 23 adult drug courts).

13. See generally AVINASH S. BHATI ET AL., URBAN INST., *TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO*

DRUG-INVOLVED OFFENDERS 56 (2008) (finding drug courts returned an average of \$2.21 for every \$1 invested, for net benefit to society of \$624 million in 2006).

14. See generally WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG CT. INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* (2011) (defining and tallying the number of various types of problem-solving courts in the U.S. and internationally).

15. See generally Douglas B. Marlowe, *The Verdict on Drug Courts and Other Problem-Solving Courts*, 2 CHAPMAN J. CRIM. JUST. 53 (2011) (reviewing research on various types of problem-solving courts).

16. See Michael Wright, *Reversing the Prison Landscape: The Role of Drug Courts in Reducing Minority Incarceration*, 8 RUTGERS RACE & L. REV. 79, 81 (2006) (stating drug courts have the "potential, not only to reduce minority incarceration, but also to heal minority communities"); MARC MAUER, SENTENCING PROJ., *THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS* 2, 14 (2009) (concluding drug courts, especially those in urban communities, are likely to be disproportionately benefiting African-Americans by diverting them from prison).

17. See NAT'L ASSOC. CRIM. DEFENSE LAWYERS, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 42 (2009) [hereafter NACDL REPORT] (concluding racial prejudice pervades the criminal justice system, and drug courts are no exception); JUST. POL'Y INST., *ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES* 23 (2011) (concluding people of color are more likely to be kicked out of drug courts); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 479-480 (2009) (concluding drug courts exacerbate racial disparities).

18. See Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT'L BLACK L. J. 27, 44 (2009) (noting "dearth of data" on race and drug courts; rather than answers, researchers have only questions).

19. See *infra* notes 44-50 and accompanying text.

[I]t is imperative for serious-minded and duly trained scientists to carefully examine what is confidently known about minority impacts in drug courts

differences might have been influenced by extraneous factors, such as participants' socioeconomic status (SES) or drug of choice—which may have been coincidentally correlated with race and truly responsible for the differential effects.

Second, some advocacy groups have seized upon the possibility of disparate racial impacts as a wedge issue to wield against drug courts and in favor of their alternative policy

proposals, such as drug decriminalization²⁰ or a restorative-justice philosophy.²¹ Putting aside for the moment the correctness of their alternative proposals, some of these advocates have marshaled weak and contradictory “evidence” against drug courts, including unverifiable anecdotes, biased correlations, and mischaracterizations of what researchers have reported in their publications. Given the potential for this hot-button issue to inflame passions on all sides of the conversation, it is imperative for serious-minded and duly trained scientists to carefully examine what is confidently known about minority impacts in drug courts and what matters require further exploration and deliberation.

II. MINORITY ACCESS TO DRUG COURTS

Drug courts have been alternately accused of unfairly excluding minority citizens from participation in the programs²² and over-targeting minorities—thus drawing them deeper into the criminal justice system—a phenomenon known as net-widening.²³ Virtually all of these assertions have been anecdotal²⁴ because representative data are sparse and very difficult to come by.²⁵

A 2008 survey of all state and territorial drug-court coordinators in the U.S. estimated that African-Americans comprised approximately 21% of drug-court participants nationally, and Hispanic and Latino/Latina citizens comprised approximately 10% of drug-court participants (see Table 1).²⁶ There was wide variability around these averages, with some drug courts reporting less than 1% minority participants in their programs and others reporting more than 95% minorities.²⁷

As points of reference, these figures were contrasted against those derived from national studies of arrestees, probationers and parolees, prison inmates, and jail inmates.²⁸ Representation of African-Americans was estimated to be approximately 7 percentage points lower in drug courts than in the arrestee and probation-and-parole populations (21% vs. 28% and 28%), and approximately 20 percentage points lower than in jails and prisons (21% vs. 39% and 44%). Representation of Hispanic and Latino/Latina citizens was estimated to be nearly equivalent to the probation-and-parole population (10% vs. 13%), and approximately 6 to 10 percentage

TABLE 1: MINORITY REPRESENTATION IN DRUG COURTS COMPARED WITH OTHER CRIMINAL JUSTICE PROGRAMS IN 2008

	African-American	% Difference in Drug Courts	Hispanic and Latino or Latina	% Difference in Drug Courts
Drug Courts	21%		10%	
Arrestees	28%	-7%	Not Reported	
Probationers & Parolees	28%	-7%	13%	-3%
Jail Inmates	39%	-18%	16%	-6%
Prison Inmates	44%	-23%	20%	-10%

Source: West Huddleston & Douglas B. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, at 30, Table 6 (Nat'l Drug Ct. Inst., 2011). Adapted with permission.

20. See NACDL REPORT, *supra* note 17, at 20-21 (advocating for the decriminalization of all controlled substances in lieu of supporting drug courts); DRUG POL'Y ALLIANCE, *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE* 19 (2011) (advocating for the removal of all criminal penalties for drug use in lieu of providing diversion opportunities within the criminal justice system, as in drug courts); JUST. POL'Y INST., *supra* note 17, at 26 (advocating for voluntary community-based treatment in lieu of drug courts).

21. See O'Hear, *supra* note 17, at 125-136 (advocating for a restorative justice model in lieu of drug courts).

22. See, e.g., NACDL REPORT, *supra* note 17, at 42-43 (asserting drug courts were developed for middle-class teens and minorities are rarely accepted); JUST. POL'Y INST., *supra* note 17, at 21 (asserting people of color are more likely to have prior felony convictions making them ineligible for drug court).

23. See, e.g., DRUG POL'Y ALLIANCE, *supra* note 20, at 8 (asserting drug courts may increase the number of people of color brought into the criminal justice system).

24. See, e.g., NACDL REPORT, *supra* note 17, at 42-43 (quoting one public defender's anecdotal experiences in one Utah drug court as evidence that drug courts discriminate).

25. *Id.* at 42 (acknowledging the extent of the problem cannot be adequately analyzed because relevant data “simply does not exist”); Wolf, *supra* note 18, at 30 (noting “virtually nothing” written about specialized courts has addressed the issues of race and bias).

26. HUDDLESTON & MARLOWE, *supra* note 14, at 28-29. These figures represent best estimates because the data were collected at the state level and the quality of statewide statistics on minority impacts was variable.

27. *Id.* at 28-29, Tables 4, 5.

28. The sources for the comparison data were: FEDERAL BUREAU OF INVESTIGATION, FBI CRIME REPORTING DATA, 2008; BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2007 (NCJ #221945); BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2008 (NCJ #228230); BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (NCJ #228417).

points lower than in jails and prisons (10% vs. 16% and 20%).

Taken together, these national statistics suggest that drug courts may be under serving racial and ethnic minority citizens, but the magnitude of the problem appears to be far smaller than that asserted by some critics. Based on these findings, a reasonable benchmark for improvement in drug courts would be to increase minority representation by approximately 7 percentage points so as to be equivalent with the arrestee and probationer populations.

A much greater concern relates to the disproportionate confinement of minorities, particularly African-Americans, in jails and prisons.²⁹ As can be seen from the above table, African-Americans were considerably less likely to be on community supervision than in jail or prison (28% vs. 39% or 44%). In contrast, Caucasians were more likely to be on community supervision than in jail or prison (56% vs. 43% or 34%).³⁰

Fortunately, a national study recently found that the number of African-Americans in state prisons for drug-related crimes has declined by nearly 22% since the advent of drug courts and similar treatment-oriented diversion programs.³¹ After ruling out several alternative explanations for this development, such as changing drug-use rates among minorities, the report credited the rapid expansion of drug courts as one likely contributor to the precipitous decline.³² Drug courts offer an evidence-based alternative to incarceration that defense attorneys can propose and judges and prosecutors can take into consideration during the plea bargaining and sentencing processes. If drug courts were to disappear, minority representation in jails and prisons would be expected to rise as opposed to decline,³³ contrary to what some policy advocates have asserted.³⁴

Nevertheless, drug courts cannot and do not accept dispro-

portionate minority representation in their programs, no matter how small the magnitude. Therefore, drug courts have set for themselves an obligation to make all reasonable efforts to bring minority representation in line with the applicable arrestee population in their respective jurisdictions.³⁵ Examples of reasonable steps to be taken include ensuring that all assessment tools used for determining eligibility are equally valid and predictive for minorities as for non-minorities.³⁶ In addition, drug courts should ensure that their eligibility and exclusion criteria are objective and race-neutral both in intent and effect. If an eligibility requirement has the unintended consequence of differentially restricting access for minorities, then extra assurances should be required that it is a necessary prerequisite for the program to achieve effective outcomes and protect public safety.³⁷ Where less restrictive adjustments can be made to a drug court's eligibility criteria to increase minority representation without jeopardizing safety or efficacy, it should be incumbent upon the program to implement such adjustments.

[D]rug courts should ensure that their eligibility and exclusion criteria are objective and race-neutral both in intent and effect.

III. MINORITY OUTCOMES IN DRUG COURTS

Numerous studies have reported that a considerably smaller percentage of minority participants graduated successfully from drug courts as compared to non-Hispanic Caucasians.³⁸ In several of the studies, the magnitudes of the differences were quite large—as high as 25 to 40 percentage points.³⁹ This problem may be particularly pronounced among African-

29. See *supra* notes 6-8 and accompanying text.

30. HUDDLESTON & MARLOWE, *supra* note 14, at 30, Table6.

31. See generally MAUER, *supra* note 16.

32. *Id.* at 14 (concluding “it is likely that at least in some jurisdictions there are people charged with a drug offense who are diverted from a prison term due to drug court programming”).

33. Cf. Wolf, *supra* note 18, at 46-47 (noting studies show minorities express more support than Caucasians for alternatives to incarceration, such as problem-solving courts).

34. See *supra* note 23 and *infra* notes 69-72 and accompanying text.

35. See NADCP MINORITY RESOLUTION, *supra* note 1, at 2.

36. *Id.*

37. Although an unintended discriminatory impact may not always be constitutionally objectionable, *Washington v. Davis*, 426 U.S. 229, 239-242 (1976), it is inconsistent with best practices for drug courts.

38. See, e.g., Mary P. Brewster, *An Evaluation of the Chester County (PA) Drug Court Program*, J. DRUG ISSUES 177, 194 (2001) (finding African-American participants were less likely to graduate from a drug court than Caucasians); Roger E. Hartley & Randy C. Phillips, *Who Graduates from Drug Courts?: Correlates of Client Success*, 26 AM. J. CRIM. JUST. 107, 113 (2001) (finding minorities significantly less likely to graduate from drug court than non-minorities); KATHARINA L. WIEST ET AL., NPC RESEARCH, VANDERBURGH COUNTY DAY REPORTING DRUG COURT EVALUATION: FINAL REPORT 32 (2007), available at http://www.npcresearch.com/Files/Vanderburgh_Adult_Eval_Final.pdf (finding Caucasians

graduated from drug court 1.74 times more often than non-Caucasians); M. Schiff & C. Terry, *Predicting Graduation From Broward County's Dedicated Drug Treatment Court*, 19 JUST. SYS. J. 291 (1997) (finding minorities significantly less likely to graduate from drug court than non-minorities); Dale K. Sechrest & David Shicor, *Determinants of Graduation from a Day Treatment Drug Court in California: A Preliminary Study*, 31 J. DRUG ISSUES 129, 139 (2001) (finding African-American and Hispanic participants less likely to graduate from drug court than Caucasians); Christine A. Saum & Matthew L. Hiller, *Should Violent Offenders Be Excluded from Drug Court Participation?*, 33 CRIM. J. REV. 291, 300 (2008) (finding Caucasian participants in drug court less likely to recidivate than non-Caucasians); SHELLI B. ROSSMAN ET AL., NAT'L INST. JUST., THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 75 (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf> (finding in a national study of 23 adult drug courts that African-Americans were less likely to show reductions in recidivism than Caucasians); David M. Stein et al., *Predicting Success and Failure in Juvenile Drug Treatment Court: A Meta-Analytic Review*, J. SUBSTANCE ABUSE TREATMENT, available at <http://dx.doi.org/10.1016/j.jsat.2012.07.002> (finding non-Caucasian participants had lower graduation rates and higher recidivism rates than Caucasians in juvenile drug courts).

39. See, e.g., STEVEN BELENKO, NAT'L CTR. ADDICTION & SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 26 (2001) (reviewing studies reporting lower graduation rates for minorities in drug courts of approximately 30 to 40 per-

A critical unanswered question is whether this disparity is a function of race per se or whether it might reflect the influence of other factors that are correlated with race.

American males between the ages of 18 and 25 years.⁴⁰ Being young and male are well-documented risk factors for failure in drug courts and other correctional rehabilitation programs,⁴¹ and it appears that combining these two risk factors with racial-minority status may multiply the likelihood of failure.

These findings are by no means universal, however, as a smaller but growing number of evaluations has found no racial differences in outcomes or superior outcomes for minorities

as compared to Caucasians, including for those between the ages of 18 and 25 years.⁴² Nevertheless, there does appear to be a plurality trend that African-Americans are less likely to succeed in many drug courts as compared to their non-racial-minority peers.⁴³

A critical unanswered question is whether this disparity is a function of race *per se* or whether it might reflect the influence of other factors that are correlated with race. Many studies have found that participants' drug of choice (particularly cocaine or heroin), employment status, and criminal history also predicted poorer outcomes in drug courts, and racial groups differed significantly on these variables.⁴⁴ For example,

in some communities African-Americans were more likely than Caucasians to be abusing crack cocaine, and it is possible that the severely addictive and destructive nature of this particular drug could have been largely responsible for their poorer outcomes.⁴⁵ This possibility requires evaluators to statistically take into account the influence of variables that are correlated with race, such as participants' drug of choice, and then determine whether race continues to predict poorer outcomes after such extraneous variables have been factored out. Only then might it be justified to conclude there are disparate racial impacts in drug courts.

In fact, a statewide study of ten drug courts in Missouri suggested that other factors might be responsible for some of the apparent racial differences in outcomes.⁴⁶ In that study, 55% of Caucasian participants graduated from the drug courts as compared to only 28% of African-Americans.⁴⁷ However, greater proportions of the African-American participants were also unemployed (56% vs. 39%), unmarried (91% vs. 83%), living with unrelated individuals (51% vs. 37%), childless (69% vs. 56%), abusing cocaine as their primary drug of choice (45% vs. 13%), experiencing low levels of family support (38% vs. 29%), and of a lower SES.⁴⁸ After taking these variables into account, race was no longer predictive of outcomes.⁴⁹ The top three factors predicting graduation from the drug courts were participants' employment status at entry, SES, and cocaine as the primary drug of abuse.⁵⁰

The results of this study suggest that racial disparities in drug-court-graduation rates (at least in Missouri) might be explained by broader societal burdens, which may be borne

percentage points); WIEST ET AL., *supra* note 38, at 32 (reporting lower graduation rate for non-Caucasians of 25 percentage points); Sechrest & Shicor, *supra* note 38, at 139 (reporting lower graduation rates of approximately 37 percentage points for African-Americans and 27 percentage points for Hispanics).

40. See, e.g., INST. APPLIED RESEARCH, AN ANALYSIS OF THE YOUNG PERSON TRACK OF THE ST. LOUIS CITY ADULT FELONY DRUG COURT 5 (2003) (finding in a drug court that 94.9% of terminated participants between 17 and 20 years of age were African-American).

41. See generally Douglas B. Marlowe et al., *Amenability to Treatment of Drug Offenders*, 67 FED. PROBATION 40 (2003) (reviewing risk factors for failure in correctional rehabilitation programs, including drug courts).

42. See Gennaro F. Vito & Richard A. Tewksbury, *The Impact of Treatment: The Jefferson County (Kentucky) Drug Court Program*, 62 FED. PROBATION 46, 49, Table 1 (1998) (finding approximately 42% graduation rate for African-American drug-court participants, compared to only 22% for Caucasians with a high school diploma or G.E.D. and 7% for Caucasians without a high school diploma or G.E.D.); Randal Brown, *Drug Court Effectiveness: A Matched Cohort Study in the Dane County Drug Treatment Court*, 50 J. OFFENDER REHAB. 191, 197 (2011) (finding better outcomes in a drug court for African-Americans and other minorities than for non-minorities); Andrew Fulkerson, *Drug Treatment Court Versus Probation: An Examination of Comparative Recidivism Rates*, 8 SW. J. CRIM. JUST. 30, 35 (2012) (finding greater reductions in recidivism in a drug court for African-Americans than Caucasians); Christine A. Saum et al., *Violent Offenders in Drug Court*, 31 J. DRUG ISSUES 107, 121 (2001) (finding race had no apparent effect on drug-

court graduation); JULIAN M. SOMERS ET AL., *MEDIATORS OF DRUG TREATMENT COURT OUTCOMES IN VANCOUVER CANADA* (Simon Fraser Univ., 2012) (finding better outcomes for aboriginal natives in a Canadian drug court).

43. Cf. Michael W. Finigan, *Understanding Racial Disparities in Drug Courts*, 6 DRUG CT. REV. 135 (2009).

44. See BELENKO, *supra* note 39, at 26 (noting lower graduation rates among minorities might have been influenced by greater likelihood of abusing cocaine or heroin); Wolf, *supra* note 18, at 45 (noting researchers have consistently reported poorer retention and graduation rates in drug courts for participants who were unemployed, low-wage earners, or less educated, regardless of race or ethnicity); Hartley & Phillips, *supra* note 38, at 114, Table 1 (finding participants more likely to graduate from drug court if they entered the program employed, obtained work during the program, finished high school, or abused drugs other than cocaine).

45. See generally J. Mitchell Miller & J. Eagle Shutt, *Considering the Need for Empirically Grounded Drug Court Screening Mechanisms*, 31 J. DRUG ISSUES 91 (2001) (finding graduation rate for African-American drug-court participants not significantly lower than for Caucasians after accounting for crack cocaine as drug of choice and lower social stability).

46. Anne Dannerbeck et al., *Understanding and Responding to Racial Differences in Drug Court Outcomes*, 5 J. ETHNICITY IN SUBSTANCE ABUSE 1 (2006).

47. *Id.* at 11, Table 1.

48. *Id.* at 11-13, Table 1.

49. *Id.* at 13.

50. *Id.* at 14, Table 3.

disproportionately by minorities, such as lesser educational or employment opportunities or a greater infiltration of crack cocaine into some minority communities. If this finding holds true in further research, it would point to obvious and concrete measures that drug courts could take to increase minority completion rates. For example, drug courts might enhance vocational rehabilitation or educational services in their programs to offset any related disadvantages experienced by minority participants.⁵¹ They might also focus on delivering interventions that are proven to be successful for treating cocaine and other stimulant addictions.⁵²

IV. TREATMENT SERVICES FOR MINORITIES IN DRUG COURTS

There is ample evidence that racial-and-ethnic-minority citizens may receive lesser-quality treatment in the criminal justice system than non-minorities.⁵³ A commonly cited example of this phenomenon relates to California's *Proposition 36*,⁵⁴ a statewide diversion initiative for nonviolent drug-possession offenders. A several-year study of Proposition 36 by researchers at UCLA found that Hispanic participants were significantly less likely than Caucasians to be placed in residential treatment for similar patterns of drug abuse, and African-Americans were less likely to receive medically assisted treatment for addiction.⁵⁵ Not surprisingly, treatment outcomes were also significantly poorer for these minority groups.⁵⁶

No quantitative data have yet been reported on whether such disparities exist within drug courts.⁵⁷ Qualitative interviews with minority participants in drug courts do not suggest

they perceived themselves as receiving lesser-quality treatment. To the contrary, in at least one study, minority participants were seemingly exasperated by receiving the same services as non-minorities and expressed a preference for a more individualized and less one-size-fits-all approach.⁵⁸ Some minority participants in that study were particularly resentful about being required to attend 12-step meetings, such as Narcotics Anonymous (NA) or Alcoholics Anonymous (AA). They reported feeling uncomfortable sharing their feelings in groups and being encouraged to accept the label of "addict."⁵⁹ Instead, they expressed a predilection for receiving employment and educational services.⁶⁰

Given how little research has addressed this question, it is not possible to conclude at this juncture whether treatment services in drug courts are or are not appropriately suited to the needs of minority participants.⁶¹ Future studies must empirically examine this issue in a more objective manner.

Until such direct evidence is garnered, drug courts should, at a minimum, apply generic principles of evidence-based treatment in their programs. For example, several studies have demonstrated improved outcomes, including for minority participants, when drug courts administered manualized, structured, cognitive-behavioral curricula.⁶² Cognitive-behavioral

[I]t is not possible to conclude at this juncture whether treatment services . . . are or are not appropriately suited to the needs of minority participants.

51. See Laura S. Cresswell & Elizabeth P. Deschenes, *Minority and Non-Minority Perceptions of Drug Court Program Severity and Effectiveness*, 31 J. DRUG ISSUES 259, 277 (2001) (concluding minority and non-minority participants viewed drug court as similarly helpful, but minorities were more appreciative of employment assistance, and non-minorities were more appreciative of substance-abuse treatment); John R. Gallagher, *Evaluating Drug Court Effectiveness and Exploring Racial Disparities in Drug Court Outcomes: A Mixed Methods Study* 94 (2012) (unpublished Ph.D. dissertation, Univ. of Texas at Arlington) (on file with author) (finding African-American drug-court participants preferred employment assistance to treatment interventions); see also Carl Leukefeld et al., *Employment and Work Among Drug Court Clients: 12-Month Outcomes*, 42 SUBSTANCE USE & MISUSE 1109 (2007) (finding better outcomes in drug court when participants received augmented vocational services).

52. See generally Patricia Marinelli-Casey et al., *Drug Court Treatment for Methamphetamine Dependence: Treatment Response and Posttreatment Outcomes*, 34 J. SUBSTANCE ABUSE TREATMENT 242 (2008) (reporting superior outcomes for drug courts utilizing the "MATRIX Model" curriculum for stimulant dependence); Richard A. Rawson et al., *A Multi-Site Comparison of Psychosocial Approaches for the Treatment of Methamphetamine Dependence*, 99 ADDICTION 708 (2004) (same).

53. See generally William B. Lawson & Anthony Lawson, *Disparities in Mental Health Diagnosis and Treatment Among African Americans: Implications for the Correctional Systems*, in CRIME, HIV & HEALTH: INTERSECTIONS OF CRIMINAL JUSTICE AND PUBLIC HEALTH CONCERNS (B. Sanders et al. eds., forthcoming 2013), available at DOI: 10.1007/978-90-481-8921-2_4 (reviewing disparities in sub-

stance-abuse and mental-health diagnoses, treatment access, and treatment outcomes for minorities); Anne Dannerbeck-Janku & Jiahui Yan, *Exploring Patterns of Court-Ordered Mental Health Services for Juvenile Offenders: Is There Evidence of Systematic Bias?*, 36 CRIM. JUST. & BEHAV. 402, 414 (2009) (finding African-American juvenile offenders were less likely than Caucasians to be referred for needed mental-health services); Steven R. Lopez et al., *From Documenting to Eliminating Disparities in Mental Health Care for Latinos*, 67 AM. PSYCHOLOGIST 511 (2012); Lonnie R. Snowden, *Health and Mental Health Policies' Role in Better Understanding and Closing African American-White American Disparities in Treatment Access and Quality of Care*, 67 AM. PSYCHOLOGIST 524 (2012).

54. California Substance Abuse and Crime Prevention Act of 2000, CAL. PENAL CODE § 1210 et seq. (West 2000) [hereafter Proposition 36].

55. UNIV. CAL. LOS ANGELES, INTEGRATED SUBSTANCE ABUSE PROG., EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT: FINAL REPORT 5 & 82 (2007).

56. *Id.* at 4 (finding treatment completion in Proposition 36 was lower for Hispanics and African-Americans).

57. See, e.g., Wolf, *supra* note 18, at 48 (concluding much of what is known about problem-solving courts and race is "speculative").

58. Gallagher, *supra* note 51, at 87, 94.

59. *Id.* at 90-91.

60. *Id.* at 88.

61. Cf. Wolf, *supra* note 18, at 52 (concluding more research needs to be done on race and drug courts).

62. See generally Cary E. Heck, *MRT: Critical Component of a Local Drug Court Program*, 17 COGNITIVE BEHAV. TREATMENT REV. 1, 2 (Correctional Counseling 2008) (finding addition of "Moral

[T]here is some evidence that providing culturally proficient or culturally sensitive interventions may improve results for minorities

interventions focus less on the expression of feelings and instead take a more active, problem-solving approach to managing drug-related problems.⁶³ Several resources are available to help clinicians in drug courts select manualized cognitive-behavioral curricula that are proven to produce positive benefits for minority participants.⁶⁴

In addition, there is some evidence that providing culturally proficient or culturally sensitive interventions may improve results for minorities in drug courts. At least one drug-court program run by an experienced African-American clinician and utilizing culturally tailored interventions demonstrated superior effects for young male African-American participants over Caucasian participants.⁶⁵ Efforts are underway to examine the intervention used in that study—presently named Habilitation, Empowerment & Accountability Therapy (H.E.A.T.)—in a controlled experimental study.

V. SANCTIONS AND INCENTIVES FOR MINORITIES IN DRUG COURTS

A commonly expressed concern about drug courts is that minority participants might be sanctioned more severely than non-minorities for comparable infractions. Anecdotal observations have typically been proffered to support this allegation,⁶⁶ and minority participants in at least one focus group did report feeling more likely than other participants to be ridiculed or laughed at during court sessions in response to violations.⁶⁷ No empirical study, however, has borne out the assertion. To the contrary, what little research has been conducted suggests that problem-solving courts, including drug courts, appear to administer sanctions in a racially and ethnically even-handed manner.⁶⁸ Considerably more research is required, however, to study this important issue in a more systematic manner and in a representative range of drug-court programs.

A related concern is that minority participants might be sentenced more harshly than non-minorities for failing out of drug court.⁶⁹ This is a particularly important matter because, as previously discussed, minorities may be more likely to be terminated from drug court than non-minorities.⁷⁰ Although this issue is far from settled,⁷¹ there is some evidence that participants who were terminated from a few drug courts did

Reconciliation Therapy” [MRT] to drug-court curriculum produced better outcomes); Robert A. Kirchner & Ellen Goodman, *Effectiveness and Impact of Thurston County, Washington Drug Court Program*, 16 COGNITIVE BEHAV. TREATMENT REV. 1, 4 (Correctional Counseling 2007) (finding the completion of each additional step of MRT in a drug court was associated with an 8% further reduction in recidivism); Marinelli-Casey et al., *supra* note 52 (reporting superior outcomes for drug courts utilizing the MATRIX Model for stimulant dependence); Scott W. Henggeler et al., *Juvenile Drug Court: Enhancing Outcomes by Integrating Evidence-Based Treatments*, 74 J. CONSULTING & CLINICAL PSYCHOL. 42, 51 (2006) (finding addition of “Multi-Systemic Therapy” [MST] and “contingency management” [CM] improved outcomes in a juvenile drug court).

63. See generally AARON T. BECK ET AL., COGNITIVE THERAPY OF SUBSTANCE ABUSE (1993) (describing cognitive-behavioral treatments for addiction); ALBERT ELLIS ET AL., RATIONAL-EMOTIVE THERAPY WITH ALCOHOLICS AND SUBSTANCE ABUSERS (1988) (same); G. ALAN MARLATT & JUDITH R. GORDON, RELAPSE PREVENTION: MAINTENANCE STRATEGIES IN THE TREATMENT OF ADDICTIVE BEHAVIORS (1985).

64. The Substance Abuse and Mental Health Services Administration (SAMHSA) maintains an internet directory of evidence-based treatments called the National Registry of Evidence-Based Programs and Practices (NREPP). The NREPP website may be searched specifically for interventions that have been evaluated among substantial numbers of racial and ethnic minority participants, at <http://www.nrepp.samhsa.gov/AdvancedSearch.aspx> (last visited Nov. 1, 2012). See also Stanley J. Huey & Antonio J. Polo, *Evidence-Based Psychosocial Treatments for Ethnic Minority Youth*, 37 J. CLIN. CHILD & ADOLESCENT PSYCHOL. 262 (2008) (reviewing effective treatments for Hispanic and Latino/Latina youths).

65. See Vito & Tewksbury, *supra* note 42, at 49 (reporting better outcomes for young, male African-American participants when drug court provided culturally proficient services delivered by an African-American clinician).

66. See, e.g., NACDL REPORT, *supra* note 17, at 43 (citing personal observation of one lawyer that Caucasian participants are given more chances before a violation than minorities in a drug court).

67. Gallagher, *supra* note 51, at 93 (reporting the perceptions of three African-American drug-court participants that the judge, staff, and/or observers laughed at them or were disrespectful during sanction hearings).

68. See generally Wendy P. Guastaferrro & Leah E. Daigle, *Linking Noncompliant Behaviors and Programmatic Responses: The Use of Graduated Sanctions in a Felony-Level Drug Court*, 42 J. DRUG ISSUES 396, 410, Table 5 (2012) (finding race was not related to the imposition of sanctions in a felony drug court); Patricia L. Arabia et al., *Sanctioning Practices in an Adult Felony Drug Court*, 6 DRUG CT. REV. 1 (2008) (finding a felony drug court serving 62% African-American participants and 25% Hispanic participants administered sanctions in a gradually escalating manner consistent with effective principles of behavior modification); Lisa Callahan et al., *A Multi-Site Study of the Use of Sanctions and Incentives in Mental Health Courts*, LAW & HUMAN BEHAV. 1, 4 (2012), available at DOI: 10.1037/h0093989 (finding no demographic characteristics, including race, predicted the imposition of jail sanctions in several mental-health courts); M. SOMJEN FRAZER, CTR. FOR CT. INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS 18, Table 3 (2006) (finding race was not related to participants’ perceptions of procedural fairness when sanctions and incentives were imposed in a community court).

69. See, e.g., O’Hear, *supra* note 17, at 480 (suggesting failure in drug court may lead to harsher sentences for minorities than not participating in drug court); NACDL REPORT, *supra* note 17, at 43 (same); JUST. POL’Y INST., *supra* note 17, at 24.

70. See *supra* notes 38-43 and accompanying text for a discussion of graduation rates among minorities and non-minorities in drug courts.

71. See JUST. POL’Y INST., *supra* note 17, at 24 (acknowledging very few studies have compared dispositions for participants who failed drug court to those traditionally adjudicated).

appear to receive relatively harsher sentences than traditionally adjudicated defendants charged with comparable offenses.⁷² There is no evidence, however, to suggest whether this practice differentially impacts minorities as compared to non-minorities. Moreover, no information is available on whether there might have been a rational basis for the judges in those cases to augment the sentences as they did.

How and when augmented sentences are imposed in drug courts is among the most important questions that need to be carefully studied by researchers. Currently, there appears to be no clear consensus about whether, or under what circumstances, it is appropriate to increase a presumptive sentence for one who fails a diversion opportunity, such as drug court; however, participants must be informed of the possibility of an augmented sentence when they execute waivers to enter the program.⁷³

Ideally, defense attorneys and potential participants should be armed with more than just the mere knowledge that an augmented sentence could be imposed. Where possible, they should be armed with data about how likely this is to occur and what factors the judge is apt to take into account when rendering such a decision. Researchers need to enlighten the drug-court field about how these important matters are determined and, most important, whether these decisions may unfairly or disproportionately impact racial-or-ethnic-minority participants.

VI. CONCLUSIONS

Much of the discourse surrounding racial- and ethnic-minority experiences in drug courts has shed more heat on the matter than light. Anecdotal impressions have been miscast as scientific data, simple correlations have been misinterpreted as proof of causality, and simplistic, even nihilistic solutions have been proffered to address complex problems of crime and drug policy.

Here is what is known:

- African-Americans appear to be underrepresented in adult drug courts by an average of a few percentage points.
- African-American participants, and to a lesser extent Hispanic and Latino/Latina participants, are considerably less likely than Caucasians to graduate from a plurality of drug courts, but not all drug courts. This difference does not appear to be a function of race or ethnicity *per se*, but rather a function of other socio-demographic characteristics which may be correlated with race or ethnicity.
- Evidence suggests graduation rates for African-American and Hispanic participants may be substantially increased by:
 - providing vocational services and assistance;
 - administering structured, cognitive-behavioral treatment curricula;

- administering treatments that are focused on the prevalent drugs of choice in minority communities (e.g., cocaine and heroin);
- better preparing minority participants for what to expect before referring them to 12-step meetings; and
- administering culturally tailored interventions for young African-American males.
- Empirical evidence does not support the assertion that minority participants receive different sanctions for comparable infractions in drug courts; however, insufficient research has addressed this question.
- No valid research has investigated whether minority participants are sentenced more harshly than non-minorities for failing drug court.

Clearly, the drug-court field is left with more questions than answers. More research is needed to determine what services minority participants typically receive in drug courts, how to enhance minority outcomes in drug courts, and what consequences typically ensue from program failure. Moreover, little is known about the impacts of drug courts on minority groups other than African-Americans and Hispanics. Researchers need to make extra efforts to recruit a diverse range of citizens into their studies and validly assess disparate impacts across the full spectrum of racial and ethnic subgroups that are enrolled in drug-court programs or charged with drug-related offenses.

Drug courts are, first and foremost, *courts*, and the most fundamental principles of due process and equal protection continue to apply to their operations.⁷⁴ Drug courts came into being to solve some of our most dire social ills, and it would be a tragedy if programs designed to help people exacerbated their problems. Moreover, drug courts were created to correct certain social injustices emanating from the War on Drugs, and they must not turn a blind eye to the faintest possibility that they might be exacerbating some of those self-same injustices. It is incumbent upon drug courts to take a fearless inventory of their actions, admit their shortcomings where applicable, and continue striving to perform their vital work ever more effectively and humanely.⁷⁵



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72. See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008) (concluding sentences for participants who were terminated from drug courts in New York were two to five times longer than for conventionally adjudicated defendants).

73. See generally William G. Meyer, *Constitutional and Legal Issues in Drug Courts*, in NAT'L DRUG CT. INST., THE DRUG COURT JUDICIAL BENCHMARK 159, 164 (Douglas B. Marlowe & William G. Meyer

eds., 2011) (noting waiver of trial rights in drug courts must be knowing, voluntary, and intelligent).

74. See, e.g., *id.* at 163 (noting drug courts must safeguard the due-process rights of participants).

75. Some readers might recognize these principles as stemming from the precepts of AA and NA. See ALCOHOLICS ANONYMOUS WORLD SERVICES, TWELVE STEPS AND TWELVE TRADITIONS 6-8 (1981).

The Court's Brain:

Neuroscience and Judicial Decision Making in Criminal Sentencing

Kimberly Papillon

Cutting-edge neuroscientific studies provide new insights into the inner workings of the human brain. At the same time, innovations in justice-system data collection have allowed researchers to gather and analyze vast quantities of statistical data in criminal-sentencing patterns. The combination of the two genres of study provides us with the first scientifically based demonstration that well-meaning egalitarian judges may have strong neurophysiologic reactions to defendants, victims, experts, and attorneys. These reactions help us explore whether or not race affects judicial decision making.

The Model Code of Judicial Conduct, caselaw, the Fourteenth Amendment, and the constitutions of every state prohibit judges from using race as a factor in sentencing.¹ However, traditional notions of race bias are based on the idea that disparate outcomes are a simpleminded application of racial bias perpetrated by a select few judges who are not aligned with the values of the justice system.² *The overwhelm-*

ing majority of judges are committed to fairness and impartiality. The overwhelming majority of judges would also agree that racial bias is abhorrent and that it has no place in our justice system. However, the emerging neuroscience compels the thoughtful analyst to inquire about the role of the brain's automatic reactions in decision making.

Neuroscientists explore the brain's processes, but the justice system must be provided with an analysis of how the law shapes the ways that a judge's brain may react. The rigorous analysis required in the application of the four principles of criminal sentencing (i.e., retribution, rehabilitation, deterrence, and incapacitation)³ may allow or even facilitate problematic neurophysiologic reactions in a judge's brain and may result in disparate sentencing patterns. Yet the sentencing disparities are not explored, and the proof that racial bias is the cause is not fully accepted.⁴ This is partially because the ways in which racial bias may manifest in a judge's brain are not easily understood.⁵

Footnotes

1. The Model Code of Judicial Conduct prohibits bias in judicial decision making. This section of the Code is mimicked by many states and the federal courts. Section 2.3 of the Model Code states: *Bias, Prejudice, and Harassment*
(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others. MODEL CODE OF JUDICIAL CONDUCT § 2.3 (2007).
2. *Tapia v. United States*, 131 S. Ct. 2382, 2386-2387 (2011) (not mentioning race but explicitly recognizing that disparities in sentencing "imposed on similarly situated defendants" were so significant that the Legislature enacted the Sentencing Reform Act of 1984).
3. 18 U.S.C. § 3553(a) (1984) states in part:
(a) Factors to Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

- (2) the need for the sentence imposed—
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

- See also* *Tapia*, 131 S. Ct. 2382 (stating that factors 2(A) through (D) of 18 U.S.C. § 3553 (1984) are the "four considerations—retribution, deterrence, incapacitation, and rehabilitation— [that] are the four purposes of sentencing generally, and a court must fashion a sentence "to achieve the[se] purposes . . . to the extent that they are applicable" in a given case. (citing 18 U.S.C. § 3551(a) (1984)).
4. *Furman v. Georgia*, 408 U.S. 238 (1972) (Burger, C.J., dissenting). Even while Chief Justice Burger concludes in his dissent that the death penalty was not cruel and unusual and that the evidence submitted did not demonstrate sufficient racial disparities, he clearly acknowledged that [i]f a statute that authorizes the discretionary imposition of a particular penalty for a particular crime is used primarily against defendants of a certain race, and if the pattern of use can be fairly explained only by reference to the race of the defendants, the Equal Protection Clause of the Fourteenth Amendment forbids continued enforcement of that statute in its existing form. *Furman*, 408 U.S. at 389, n. 12.
 5. Courts have recognized that implicit or unconscious racial bias exists and that it may affect decision making in other contexts. *See* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-991 (1988) (recognizing in the Title VII context that "subconscious stereotypes and prejudice" are "a lingering form" of the discrimination and that these unconscious biases have "precisely the same effects as a system pervaded by impermissible intentional discrimination").

If a judge has a million minute, consecutive neurophysiologic reactions during a moment in a trial, and if some of those minute reactions are quantitatively or qualitatively different based on whether the defendant is African-American, Latino, Native American, Asian-American, Pacific Islander or Caucasian, then the ultimate outcome of the judge's decision-making process—the sentence itself—will likely differ as well. Some defendants will receive more time in prison than others for the same crime, and race will be a determinative component.

The methodologies for these studies have advanced over time, but they have been grounded in a reductionist approach. To understand the reactions, researchers first sought to identify the neural substrates that activate in reaction to different stimuli (i.e., faces, questions, images, or sounds). Next they sought to create ever more elegant evaluations of the ways to manipulate the stimuli to activate the very same neural substrates. They wanted to know what parts of our brains activate during different cognitive tasks, and then whether biases have an effect on these tasks. The initial research on bias and its origins was an attempt to understand how we think. Its progeny is a quest to understand how or whether we can alter our thought process, presumably for the good of society.

The acceptance of the research is complicated by the fact that the scientific nomenclature and dense calculus-laden findings are often set outside of the realm of understanding of those who could make the most of the conclusions—those who are in a position to create systemic change, such as powerbrokers in business, policymakers in the political arena, and the decision makers within the justice system.⁶ However, if judges are given access to the studies demonstrating the pervasive nature of these brain reactions, and the affect of each differential step on the decision-making process, they may begin to advocate for systemic change.⁷

This article treats the neurophysiologic reactions and the ways that they interact with the four principles of criminal sentencing in four parts. Part I shows that there are precise areas of the brain that activate unconsciously in a racially biased manner, and those are the same parts used to deter-

mine the basis for the appropriate length of incapacitation in prison. Part II shows that biological measures for pain, empathy, and aggression may affect a judge's ability to equitably determine the appropriate amount of retribution required for a crime. Part III demonstrates that judges may unconsciously presume that more punishment is necessary to effectively deter criminal behavior in certain racial groups due to a judge's failure to properly encode those groups in the judge's prefrontal cortex. Part IV demonstrates that automatic associations between crime, threat, and certain racial groups may affect a judge's ability to accurately assess the potential for rehabilitation.

[I]f judges are given access to studies demonstrating . . . these brain reactions, . . . they may begin to advocate for systemic change.

I. SENTENCING THEORY

In criminal courts, judges are expected to execute their duties in a way that ensures they evenly and equally apply the factors set forth in the law to all defendants, regardless of race. They are further expected to remove inappropriate biases from their decision-making process so that the biases will not influence those decisions. *However, it is precisely the inquiry required by the principles of sentencing that calls upon judges to activate the parts of their neuro-anatomy that use biases.*⁸

When sentencing in criminal court, a judge is required to apply a wide range of factors to determine the appropriate length of the sentence. While there is much diversity between the criminal sentencing laws from state to state, and between state sentencing laws and federal sentencing laws, the four basic purposes for punishment in criminal sentencing appear to be universal.

Historically, retribution, rehabilitation, deterrence, and incapacitation have been the four corners of sentencing law.⁹ Over

6. JERRY KANG, IMPLICIT BIAS: A PRIMER FOR COURTS (2009), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>.

7. The Model Code Comment to Section 2.3 seems to recognize the possibility that racially biased templates or "stereotypes" may manifest in judicial decision making. It states in part:

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; *negative stereotyping*; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[Emphasis added.] MODEL CODE OF JUDICIAL CONDUCT, § 2.3, Comment (2007).

8. Kevin R. Reitz, *Sentencing*, in THE HANDBOOK OF CRIME AND PUNISHMENT 542, 548. (Michael Tonry ed., 1998) ("Frankel's central concern was that discretionary actors such as judges and parole officials followed no rhyme or reason beyond their own personal instincts. Punishment decisions, more important than much of the other routine business of the courts, were deserving of at least a comparable degree of care.")

9. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2006). See also Joshua Dressler, UNDERSTANDING CRIMINAL LAW 13-18 (3d ed. 2001), for further discussion:

A deterrence-based punishment seeks to convince the general community (and, in some formulations, the offender himself or herself) not to commit (or repeat the commission of) the crime for which the offender is being sentenced. An incapacitation-based punishment relies on confinement and supervision in order to prevent future crimes by offenders who are believed to represent particu-

[T]he neurophysiologic and cognitive process of threat assessment is perhaps the most compelling demonstration of bias available

the years, the popularity of each principle has waxed and waned. While one emerges as the vogue until its time in favor dissipates, another is declared repugnant by factions of society. At times, concurrent warring views may be held by influential groups. For example, in the early 1970s and 1980s, the Model Penal Code emphasized retribution in sentencing; however, more recent

amendments to the code have placed greater emphasis on rehabilitation as a goal. Conversely, in 1984, federal lawmakers rewrote the penal code to reflect their conclusion that rehabilitation was no longer a realistic goal.¹⁰

The four principles of sentencing law are based in large part on determination of the choices available to the actor, the motivation to act, and the level of injury suffered by the victim. Early classical theorists provided insight into the process of rational choice. It is assumed that each actor is concerned with his own suffering, which is a potential penalty for engaging in a criminal act, and that this concern prevents many people from engaging in criminal behavior. It is further assumed that many people choose not to engage in criminal behavior because it is not in alignment with their value system. Determining how to apply the four purposes for punishment is based in part on a judge's conclusions about a convicted individual's inherent dangerousness or proclivity for engaging in criminal behavior, the judge's sympathetic response to the victim and the defendant, and the judge's belief in the ability of the defendant to change his behavior.

INCAPACITATION

Incapacitation, or removing an individual from society and from his capacity to continue to engage in criminal behavior, is necessary for longer periods of time if the convicted person is more dangerous. A judge must increase the length of sentences for those who cannot change and who pose a significant threat. Thus the analysis for determining the need for incapacitation requires the judge to assess the perceived level of threat. However, the neurophysiologic and cognitive process of threat assessment is perhaps the most compelling demonstration of bias available in the scientific literature today.

Validated studies have consistently shown that specific areas of the amygdalae, small subcortical nodes in the brain, activate when subjects feel fear, threat, anxiety, and distrust.¹¹ The progeny of these studies has explored the various stimuli that activate this region and the layers of subtleties that demonstrate the complexities of the reactions.¹² Individuals with diagnosed phobias, specifically arachnophobia (fear of spiders) and ophidiophobia (fear of snakes), demonstrate a significantly higher level of amygdala activation when they view pictures of spiders and snakes in comparison to when they view pictures of other predatory, threatening, or ferocious creatures, such as tigers.

Functional Magnetic Resonance Imaging (fMRI) studies have shown there is increased neural responsivity in the amygdalae to African-American faces.¹³ One of the pioneering studies in this area showed a measurable increase in left-superior amygdala activation when subjects viewed African-American male faces versus Caucasian male faces.¹⁴ All of the study participants were Caucasian.

However, to ensure a thorough analysis of the intersection between neuroscience, cognition, and criminal sentencing, we

lary important recidivism threats. A rehabilitative sentence will involve some form of therapy, treatment, or training to help address the underlying causes of criminal behavior. Just deserts, a form of retributive punishment, is often contrasted with the foregoing utilitarian purposes of punishment; desert does not seek future crime prevention per se, but rather demands punishment as a moral imperative in its own right, often seen as necessary to affirm the status of victims or show respect for the personhood of defendants.

10. *Tapia*, 131 S. Ct. at 2386-87. *Tapia* doesn't mention race but explicitly recognizes that disparities in sentencing were so significant that the legislature enacted the Sentencing Reform Act of 1984. It further recognizes that Congress was also motivated to pass the Act based on the belief that that rehabilitation was not possible in most cases:

"For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing." [quoting *Mistretta v. United States*, 488 U. S. 361, 363.] . . . But this model of indeterminate sentencing eventually fell into disfavor. One concern was that it produced "[s]erious disparities in [the] sentences imposed on similarly situated defendants [citation omitted]." *Tapia*, 131 S. Ct. at 2368-87.

11. Sergi G. Costafreda, Michael J. Brammer, Anthony S. David, &

Cynthia H.Y. Fu, *Predictors of Amygdala Activation During the Processing of Emotional Stimuli: A Meta-Analysis of 385 PET and fMRI Studies*, 58 *BRAIN RES. REV.* 57 (2008); Frank Van Overwalle, *Social Cognition and the Brain: A Meta-Analysis*, 30 *HUM. BRAIN MAPPING* 829 (2009).

12. Additionally fear becomes a learned response on a molecular level:

It is generally believed that long-term retention of the effects of learning involve intracellular cascades that are triggered by the influx of calcium during postsynaptic depolarization [citations omitted]. The rise in calcium then triggers several kinases and transcription factors These act, possibly in concert, to induce genes and initiate synthesis of new proteins. Joseph LeDoux, *The Emotional Brain, Fear, and the Amygdala*, 23 *CELLULAR & MOLECULAR NEUROBIOLOGY* 727, 731 (2003).

13. David M. Amodio, Eddie Harmon-Jones, Patricia G. Devine, John J. Curtin, Sigan L. Hartley, & Alison E. Covert, *Neural Signals for the Detection of Unintentional Race Bias*, 15 *PSYCHOL. SCI.* 88 (2004).

14. Elizabeth A. Phelps, Kevin J. O'Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore, & Mahzarin R. Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activity*, 12 *J. COGNITIVE NEUROSCIENCE* 729 (2000).

must continue the inquiry to include the subtleties of the study. The study included much more revealing correlations.¹⁵

The study also used the “startle blink reaction,” which measures the reactions of the muscles around the eyes when the subject is presented with certain stimuli. The startle-blink reaction is a measurable indication of fear. The reaction is very difficult to control or hide, and often the strength with which the subject blinks or the number of times the subject blinks when presented with certain visual stimuli is unknown to the subject himself. Researchers found a direct correlation between the level of amygdala activation and the startle-blink reaction when subjects were presented with pictures of African-American and Caucasian male faces.¹⁶ The subjects who had increased left-superior amygdala activation when viewing African-American faces demonstrated a correspondingly greater startle blink reaction when viewing African-American faces.

The study also collected explicit measures of bias (i.e., bias that the subjects are conscious of or willing to admit to themselves or others). Explicit measures required the subject to state whether or not they held racial preferences and to what degree. The explicit reports demonstrated that when it comes to race, people rated themselves as only marginally biased or not biased at all against African-Americans.¹⁷ Notably, the explicit measures or admissions of bias did *not* correlate with the level of amygdalae activation or the startle-blink reaction.

INCREASED AMYGDALA ACTIVATION BASED ON AFROCENTRIC FACIAL FEATURES

The affect of race on the brain is potentiated by the level of “typically” African or “typically” Caucasian facial features. The more African a person’s face appears, the higher the level of fear; and the more Caucasian a person’s face appears, the lower the level of fear. Research revealed that there was increased amygdala activation in subjects who viewed faces with more pronounced Afrocentric facial features.¹⁸ A series of photographs of both African-American and Caucasian faces were presented to subjects. One photograph was an African-American male face with strong Afrocentric features (full lips, broad nose, dark skin, and curly hair). One photograph was a picture of an African-American male with more Eurocentric features. Another photo was of a Caucasian male with more Afrocentric features. And the final photograph was of a Caucasian person with more Eurocentric features. The amygdala activation was highest for the African-American male face with the Afrocentric features.¹⁹ The next

Research revealed that there was increased amygdala activation in subjects who viewed faces with more pronounced Afrocentric facial features.

15. Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56 (2005). Caucasian subjects viewed African-American and Caucasian faces and showed increased amygdala activation for the Caucasian faces, particularly when required to categorize the pictures based on the age of the person pictured.

16. The study’s authors noted that while the differential activation was unimpressive, the level of amygdala activation correlated with the level of unconscious or implicit racial bias shown on a well-known psychological test called the Implicit Association Test (IAT). The IAT is a computerized test that is validated with an overwhelmingly statistically significant sample. People have completed over 4.5 million IAT’s online and had their data recorded by Project Implicit, the center that administers the IAT website. Project Implicit, General Information, <http://www.projectimplicit.net/generalinfo.php>.

The IAT measures mistakes made in matching words to specific categories, and it measures, in milliseconds, the time that it takes the subject to make these matches. The amount of delay and the number of mistakes are assessed, and the result demonstrates the strength of the implicit association between the words and the categories. The Race IAT (also known as the Black/White IAT) has four segments, and in one of the segments, it presents two categories: 1) “black and good”; and 2) “white and bad.” Damian Stanley, Elizabeth A. Phelps, & Mahzarin Banaji, *The Neural Basis of Implicit Attitudes*, 17 CURRENT DIRECTIONS PSYCHOL. SCI. 164 (2008). The subject is asked to match words to each category that relates to bad (i.e., agony, horrible, etc.) and words that relate to good (i.e., joy, happy, etc.), as well as photographs of faces of African-American and Caucasian people. In a separate segment, the subjects are required to match the same words (i.e., agony, horrible, joy, happy, etc.) and the same photographs of black and white faces to new compound categories: 1) “black and bad”; and

2) “white and good.”

The level of amygdala activation in the study correlated directly with the level of bias demonstrated on the Race IAT. The study participants whose fMRI’s showed greater amygdala activation when viewing the African-American male faces had correspondingly greater difficulty, slower response time, and more errors when they tried to match the words and pictures with the compound categories “black and good” and “white and bad” than when they had the categories “white and good” and “black and bad.” Jennifer A. Richeson, Abigail A. Baird, Heather L. Gordon, Todd F. Heatherton, Carrie L. Wyland, Sophie Trawalter, & J. Nicole Shelton, *An fMRI Examination of the Impact of Interracial Contact on Executive Function*, 6 NATURE NEUROSCIENCE 1323 (2003) (This examination shows that as implicit racial bias increases and garners resources to fit the level of amygdala and insula reaction, other cognitive skills such as executive functioning are substantially impaired. An fMRI study measured impairment to executive functioning in the dorso-lateral prefrontal cortex (dlPFC) when Caucasians interacted with African-Americans).

17. Brian A. Nosek et. al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 36 (2007).
18. Jaclyn Ronquillo et al., *The Effects of Skin Tone on Race-related Amygdala Activity: An fMRI Investigation*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 39 (2007).
19. Multiple studies demonstrate that people apply racial stereotypes to African-Americans who have stronger Afrocentric facial features than to African-Americans who have weaker Afrocentric facial features. Keith B. Maddox, 8 *Perspectives on Racial Phenotypicity Bias*, PERSONALITY & SOC. PSYCHOL. REV. 383 (2004); Keith B. Maddox & Stephanie Gray Chase, *Manipulating Subcategory Salience: Exploring the Link between Skin Tone and Social Perception of Blacks*, 34 EUR. J. SOC. PSYCHOL. 533 (2004).

The insula has been typically associated with aversion, revulsion, or disgust

highest level of amygdala activation occurred with the African-American face that had more Eurocentric features. The subjects also showed amygdala activation for the Caucasian face with Afrocentric features (though not as strong as the reaction to the African-American faces).²⁰

INSULA ACTIVATION

In addition to stronger amygdala activation for African-American faces, studies also demonstrate a stronger insula reaction among some Caucasian people for African-American faces.²¹ The insula has been typically associated with aversion, revulsion, or disgust; for example, it is the part of the brain that activates when we smell rotting garbage.²² In the study, the subjects viewed faces of African-Americans and Caucasians while undergoing fMRI scans. The insula reaction was significant when the subjects saw the faces of individuals from a different race.

Notably, criminal-law scholars and economists have cited revulsion as a component of the motivation for incapacitation.²³ Someone whose crime is repulsive to a judge will be a prime candidate for removal from society, and for longer periods of time. If a defendant's appearance or identity creates an aversion or repulsion response, this may enhance the adverse response to the crime. The prospect of sending someone back into society who creates the same reaction in a judge as the smell of rotten garbage is likely to be avoided. If the revulsion reaction is potentiated by race, the African-American defendant may receive a longer term in prison based on this impermissible factor. Unfortunately, the process of analyzing the need for incapacitation may include deciding whether or not a defendant can be returned to society or whether they are associated with the emotion of aversion and cannot re-join society for an extended period of time. The analysis requires the judge to tap into the revulsion response to make this assessment, and the revulsion response may be biased by race.

DIMINISHED PREFRONTAL-CORTEX EXECUTIVE FUNCTIONING

In addition to the increased amygdala activation as a result

of racial bias, resources needed for other brain functions will be depleted. As bias increases, garnering resources to fit the level of amygdala and insula reaction, other cognitive skills such as executive functioning are substantially impaired. An fMRI study measured impairment to executive functioning in the dorsolateral prefrontal cortex (dlPFC) when Caucasians interacted with African-Americans.²⁴

In the study, some of the participants interacted with an African-American (possibly to create an amygdala and insula reaction in the brain) and some interacted with a Caucasian person. The participants were then required to perform a task that should have recruited their executive functioning—a cognitive color-matching test called the Stroop Test. The participants who interacted with the African-American person before attempting to complete the color-matching test were slower and less accurate when completing the test. Moreover, those who interacted with the African-American person before they attempted the color-matching test showed diminished activation in their dorsolateral prefrontal cortex.

In this context, if executive functioning is diminished due to neurophysiologic reactions to African-Americans, then the decision maker will be less able to access the proper rules to apply to the sentencing decision but will simply apply default rules (such as implicit associations equating “Black” with “bad”) to the decision instead.

Aversion and disgust, when combined with fear, threat, distrust, and diminished executive functioning, create a formidable combination for the African-American defendant to overcome.²⁵ A judge's determination of the level of threat a defendant poses and whether the defendant should be separated from others in society is not simply permissible, it is required in the incapacitation analysis. However, in assessing these factors, the judge may include the reaction of fear, threat, and aversion. The neurophysiologic reaction to the African-American male, particularly the African-American male with strong Afrocentric facial features, is worthy of further discussion. The potential connection to resulting disparities in criminal sentencing is stark.

AFROCENTRIC FACIAL FEATURES AND CRIMINAL SENTENCING

Afrocentric facial features have an impact on the length and type of sentences given to inmates.²⁶ A Stanford University

20. Y. Moriguchi, T. Ohnishi, T. Kawachi et al., *Specific Brain Activation in Japanese and Caucasian People to Fearful Faces*, 16 NEUROREPORT 133 (2005).

21. Matthew D. Lieberman, Ahmad Hariri, Johanna M. Jarcho, Naomi I. Eisenberger, & Susan Y. Bookheimer, *An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720 (2005).

22. P. Wright, G. He, N. A. Shapira, W. K. Goodman, & Y. Liu, *Disgust and the Insula: fMRI Responses to Pictures of Mutilation and Contamination*, 15 NEUROREPORT 2347 (2004).

23. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

24. Jennifer A. Richeson & Sophie Trawalter, *Why Do Interracial Interactions Impair Executive Function? A Resource Depletion Account*, 88 J. OF PERSONALITY & SOC. PSYCHOL. 934 (2005);

Jennifer A. Richeson, Sophie Trawalter, & J. Nicole Shelton, *African-Americans' Racial Attitudes and the Depletion of Executive Function after Interracial Interactions*, 23 SOCIAL COGNITION 336 (2005).

25. While it may be argued that in-group preference can be shown by any racial group, it must be noted that the majority of judges in the U.S. are Caucasian. Carl Tobias, *Commentary: Diversity and the Federal Bench*, 87 WASH. L. REV. 1195 (2010). In many state courts, over 90% of the judges are Caucasian. With few exceptions, the overwhelming majority of state supreme courts are all Caucasian.

26. Irene V. Blair, Charles M. Judd, & Kristine M. Chapleau, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004); Irene V. Blair, Charles M. Judd, & Jennifer L. Fallman, *The Automaticity of Race and Afrocentric Facial Features in Social Judgments*, 87 J. PERSONALITY & SOC. PSYCHOL. 763 (2004).

study demonstrated that facial features of African-American male defendants correlate to imposition of the death penalty.²⁷ The study showed that as the faces of the defendants depicted higher levels of Afrocentric facial features, the defendants were more likely to receive the death penalty. Using mug shots of faces of men convicted of crimes for which the death penalty could be imposed, the researchers coded the faces for Afrocentric features. Those individuals with more Afrocentric facial features were more likely to receive the death penalty when controlling for numerous other factors.²⁸ The level of Afrocentric facial features potentiated the desire of the jury to impose the death penalty. This result aligns with the fMRI studies showing increased amygdala and insula activation for African-Americans.

DISPARITIES IN CRIMINAL SENTENCING AND THE NEUROSCIENTIFIC CORRELATES

Nationwide, African-Americans constitute 38% of the jail and prison population, but they constitute only 13% of the United States population.²⁹ In response to such statistics, many immediately advance the rationale that African-Americans simply commit more crimes and, therefore, they are overrepresented in the prison population. However, a more thorough analysis of the statistics demonstrates a disturbing disparity not explained by alleged increased crime rates. According to the U.S. Department of Health and Human Services, in 2006, African-Americans made up only 14% of illegal-drug users, in parity with their 13% representation in the U.S. population. Yet they are overrepresented in the subsequent steps in the criminal justice pipeline. African-Americans represent 35% of arrests for drug offenses, 53% of convictions for drug offenses, and 45% of those incarcerated for drug offenses.³⁰ Additionally, the more lenient sentencing option of probation is given more freely to Caucasian offenders. In 2006, 56% of those on probation were Caucasian, while only 29% were African-American.³¹

FEDERAL SENTENCING STUDY

In a study of sentencing patterns nationwide, researchers compiled data from 77,256 defendants sentenced in federal courts under the United States Sentencing Commission Guidelines. The researchers conducted a regression analysis, which controlled for multiple factors that should affect the length of sentences, including crime seriousness or offense level and criminal history.³²

Offense level was determined by the severity of the offense. The offense was assigned a base value that correlated to the offense level identified in the code. This base value was then increased or decreased based on other characteristics of the offense (i.e., whether the offense resulted in a substantial likelihood of death or serious bodily injury; the monetary amount gained by the offender; whether the victim was a minor; whether the crime was committed with a gun, etc.). The study also controlled for criminal history, including the severity and number of past offenses and whether the offense was committed while on probation or parole, etc.³³

While all of these factors affected sentencing, there was still a disparity in the sentences handed down, and race was the determinative factor. African-Americans received 5.5 more months in prison than their Caucasian counterparts for the same crimes, with the same criminal history and the same aggravating and mitigating factors. Latinos received 4.5 months in jail more than Caucasians who were charged with the same crime. A combined group of Asians, Pacific Islanders, Native Americans, and those of mixed heritage was included in the analysis as well. This group received 2.3 months more in prison than their Caucasian counterparts. These disparities remained significant even when the researchers controlled for income, education level, citizen-

While all of these factors affected sentencing, . . . race was the determinative factor.

27. David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL LAW REVIEW 1638 (1998) (showing that African-American defendants receive the death penalty more frequently than their Caucasian counterparts).

28. Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

29. ASHLEY NELLIS, JUDITH GREENE, & MARC MAUER, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2008), available at http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

30. *Id.* at 8, citing WILLIAM J. SABOL, HEATHER COUTURE, & PAIGE M. HARRISON, PRISONERS IN 2006 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p06.pdf>.

31. Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the*

United States (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus07st.pdf>.

32. 18 U.S.C. § 3553(a)(1) (1984) specifically calls for the judge to consider the characteristics of the defendant as well as the criminal history:

(a) Factors to Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
(1) the nature and circumstances of the offense and the history and characteristics of the defendant”
[Emphasis added.]

33. To determine the severity of past convictions, offenders receive a designated number of criminal-history points for every prior sentence of imprisonment exceeding 1 year and 1 month. The researchers also quantified criminal history by adding points based on whether the offense was committed while the offender was under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

The researchers found that African-American inmates with more Afrocentric features received longer sentences.

Pacific Islanders, and Native Americans still received 2.3 more months in federal prison.

The additional time in prison for being African-American is equivalent to the additional time provided for a prior felony conviction. Thus, in this context, being African-American was equivalent to committing an additional crime.

AFROCENTRIC FACIAL FEATURES AND THE AMYGDALA

The most telling correlation between amygdala studies and statistical data can be found with Afrocentric facial features. Amygdala activation increases as the level of Afrocentric facial features of the person being viewed increases. A recent study found that sentence length also increases as Afrocentric facial features increase. Researchers studied Afrocentric facial features across racial lines. Using mug shots, faces of African-American men and Caucasian men who had been convicted of felonies in Florida were coded for Afrocentric features on a scale of 1 to 9, 9 being the highest and 1 being the lowest. The researchers then reviewed the case files and controlled for 11 separate factors that may also affect the length of the sentence, such as seriousness of the primary offense, number of additional concurrent offenses, seriousness of additional concurrent offenses, number of prior offenses, and seriousness of prior offenses.

The researchers found that African-American inmates with more Afrocentric features received longer sentences. Inmates who were one standard deviation greater than the norm for Afrocentric features received 7 to 8 months more in jail than inmates who were 1 standard deviation below, controlling for the 11 other factors. The stronger facial features accounted for a 2% increase in sentence length. While this may seem minor, it should be noted that having an additional concurrent serious offense charged increased the sentence length by 3%. *In other words, having a broader nose, darker skin, fuller lips, and curlier hair was almost equivalent*

ship, age, language status, etc. After these adjustments for socioeconomic factors, African-American defendants received 4.5 months more in prison than Caucasians for the same crime; Latino defendants received 2.5 more months in jail; and the aggregate group of Asian-Americans,

to being saddled with an additional serious criminal charge. It was as if the Florida Penal Code listed looking African-American as a crime as serious as aggravated assault or possession with intent to sell.

Surprisingly, Caucasian inmates with Afrocentric features also received longer sentences than their Caucasian counterparts with more Eurocentric features. Once again, inmates who were one standard deviation greater than the norm for Afrocentric features received 7 to 8 months more in jail than inmates who were 1 standard deviation below, controlling for seriousness of crime, prior convictions, additional crimes charged, and several other factors.

We need not stop the inquiry here, however. The four principles that underlie the sentencing process go beyond the simple detection of threat or aversion.³⁴ Retribution includes the assessment of appropriate levels of counter-injury.

II. RETRIBUTION

Retribution in sentencing theory is based on the conclusion that a crime “demands punishment as a moral imperative in its own right.”³⁵ As with the other factors in sentencing, retribution includes a consideration of the impression left by a defendant on the mind of a judge (i.e., culpability and intent).³⁶ However, retribution also requires the judge to consider the victim. The judge must consider the level of pain or injury suffered by the victim along with the victim’s value or status, affording the victim the right to have a counterbalancing punishment for a defendant that fits the crime.³⁷ Indeed, the calculation surrounding what charges to bring and what chances a case has in front of a jury includes, at its core, whether or not there is a sympathetic victim that the jury will relate to and want to vindicate.

Empathy is an outgrowth of an individual’s ability to relate to the victim—to find a connection with the victim’s identity and plight so that the individual can imagine the pain of the victim as his or her own pain. For retribution, the analysis of the level of the injury and the empathy and value for the victim are inextricably intertwined. The law explicitly and reasonably increases penalties for the same injury suffered by someone who is helpless (e.g., a child or an elderly person) verses someone who is capable of defending themselves. Likewise, retribution may be unconsciously and impermissibly increased for the same injury suffered by someone for whom a judge feels more empathy versus someone for whom the judge feels very little or no empathy. Additionally, there is the ever-present “how dare you” factor. This embodies the notion that as an individual empathizes

34. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

35. See O’Hear, *supra* note 9, citing DRESSLER, *supra* note 9, stating:

Just deserts, a form of retributive punishment, is often contrasted with the foregoing utilitarian purposes of punishment; desert does not seek future crime prevention per se, but rather demands punishment as a moral imperative in its own right, often seen as necessary to affirm the status of victims or show respect for the personhood of defendants.

36. Those who seek to injure or who show callous disregard for the

injury they cause in the commission of their crime are more culpable. Conversely, those who act out of negligence are less culpable and, therefore, deserving of lower levels of retribution. The level of injury caused is also a factor used to increase or decrease the level of retribution. A judge’s ability to view that injury objectively will affect his assessment of the level of injury.

37. The theory that there are victims who are undeserving of relief for injury is most clearly seen on the face of the law in the civil context in the doctrine of unclean hands.

with the pain of a victim, he is offended that anyone would hurt a person for whom he can feel such empathy. A judge may place greater value on a victim if the judge relates to the victim and if the judge more poignantly feels the victim's pain. The value or status of the victim is, therefore, also a part of the calculation for retribution.³⁸ Thus, for the purposes of retribution, culpability is potentiated by the empathy felt for the victim.³⁹

Another factor that modulates the level of retribution downward is the level of pain and sympathy felt for the Caucasian defendant. A prison sentence will inflict pain on the defendant. If a judge has an empathetic pain response for a defendant then he will be less motivated and less likely to impose a higher level of punishment and pain in the form of a prison sentence.

As a judge determines the appropriate level of retribution, he is required to assess the culpability and the level of empathy that should be applied towards both the victim and defendant. However, this assessment, like the threat assessment for incapacitation, is inextricably and disturbingly intertwined with neurophysiologic reactions and bias.

THE PHYSIOLOGY OF PAIN EMPATHY

A study demonstrates that pain empathy may be affected by race. In the study, participants were monitored for physiologic reactions as they were shown videos of three different hands being stuck by a hypodermic needle. In a randomized order, participants watched a Caucasian hand, an African-American hand, and a purple hand being stuck by a hypodermic needle. Pain empathy is measured by the level of sensory motor contagion and cortical spinal inhibition. If an individual empathizes with another person's pain, that individual will have a physiologic reaction that is akin to actually suffering the physical injury. When an injury occurs in the body, the brain attempts to dampen down the level of pain felt. The brain achieves this by lessening or inhibiting the level of sensation felt in the injured area—this is called cortical spinal inhibition. When someone watches another person being injured and he feels empathy for the pain, he also feels cortical spinal inhibition. It is as if the pain experience is “contagious.” This phenomenon is called sensory motor contagion. Therefore, if, as a person observes another person receiving a painful hand injury, the observer has an increased level of cortical spinal inhibition in his own hand, then scientists conclude the observer empathizes with the pain of the injured person. Conversely, if the observer does not feel empathy for the pain he witnesses, then his brain will not initiate cortical spinal inhibition because there is no risk of sensory motor contagion. The brain does not need to dampen down the empathetic sensation if the observer is not having an empathetic response.

In the study, the Caucasian subjects experienced high levels of cortical spinal inhibition and sensory motor contagion

when they watched the Caucasian hand being stuck with the hypodermic needle.⁴⁰ When the Caucasian subjects saw the purple hand being stuck, they demonstrated a measurable but low level of pain empathy. However, as the Caucasian subjects saw the African-American hand being stuck

in the same painful manner, there was an opposite reaction to cortical spinal inhibition. There was an absence of empathy. Notably, the level of pain empathy felt correlated with the level of unconscious or implicit racial bias as shown on the Race IAT. The higher the level of implicit racial bias against African-Americans on the IAT, the lower the amount of empathy for the pain of the black person. Since 74% to 87.1% of the Caucasian population in America shows implicit bias against African-Americans on the Race IAT, it is possible that a significant percentage of the population may show a differential level of pain empathy toward people of African descent and a higher level of pain empathy toward Caucasians. Additionally, since the Race IAT scores among Caucasian judges are in alignment with the level of IAT results for the general population, it can be reasonably concluded that similar conclusions can be drawn for some judges.

Additionally, African-American subjects felt greater empathy for the black hand and less empathy for the Caucasian hand. However, since the level of empathy correlates with Race IAT scores and African-Americans' IAT results in large samples demonstrate that one third of African-Americans show bias in favor of Caucasians, one third show no bias toward either racial group, and only one third show bias against Caucasians, the possibility of differential pain empathy is reduced. Additionally, since African-American judges show a higher level of implicit preference for Caucasians than the general African-American population, the possibility that African-American judges may feel less pain empathy for Caucasian victims is further significantly diminished.

If a judge feels greater pain empathy for Caucasian defendants, he may not provide those defendants with long prison sentences. As the judge sends the defendant to prison, he may unconsciously imagine the harm occurring to himself. This differential and racially biased empathetic reaction may account for both the lower sentences and the downward departures from the federal sentencing guidelines for Caucasian defendants. Additionally, if a judge feels greater empathy for the pain of the victim, then any cases with Caucasian victims may result in higher sentences. The synergy between these two aspects of pain sympathy may explain why African-American defendants who are convicted of killing Caucasian victims are most frequently given

[T]he level of pain empathy felt correlated with the level of unconscious . . . racial bias . . . on the Race IAT.

38. O'Hear *supra* note 9.

39. *Id.*

40. Alessio Avenanti, Angela Sirigu, & Salvatore M. Aglioti, *Racial*

Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain, 20 *CURRENT BIOLOGY* 1018 (2010).

At first blush, it may offend the sensibilities of judges to claim that application of retribution is tied to aggression.

the death penalty by juries.⁴¹

III. AGGRESSION AND THE AMYGDALA

The retribution factor inherently recognizes that the penalty to be provided will cause pain or injury to the defendant. In fact, some penal codes state

that the purpose of sentencing is no longer rehabilitation but punishment.⁴² Whether retribution is a primary or secondary consideration, retribution analysis requires a judge to determine how much pain or injury to cause.

The process whereby one person intentionally causes another person pain, even if that pain is justified, is aggression. The lay definition of aggression has both negative and positive connotations. However, the psychological and biological definition of aggression is limited to wanting or purposely acting to cause pain or injury to another.⁴³ All human aggression is not physical aggression. Injury or harm caused intentionally is aggression, even when that hurt or harm is simply demeaning another person, causing them psychological distress, or incarcerating them.

While painted in well-meaning nomenclature designed to increase society's comfort level with the task of placing another human being in jail, the process of incarceration can be an outgrowth of aggression. The application of retribution can be based on revenge or retaliation. The principle's relationship to revenge or retaliation is so basic in the law that it can be found in the popular hornbook, *Criminal Law*, which states:

Retribution: This is the oldest theory of punishment, and the one which still commands considerable respect from the general public. By this theory, also called *revenge* or *retaliation*, punishment (the infliction of suffering) is imposed by society on criminals in order to obtain revenge, or perhaps (under the less emotional concept of retribution) because it is only fitting and just that one who has caused harm to others should himself suffer for it. [Emphasis added.]⁴⁴

At first blush, it may offend the sensibilities of judges to claim that application of retribution is tied to aggression. The judicial canons look down upon displays of some forms of aggression from individual judges, but those displays are ones that demonstrate malice or overt self-satisfaction with causing pain to a defendant. Such aggression is distasteful and not publicly sanctioned. However, human aggression can be channeled through sanctioned processes. It can be aligned with governmental purposes. It can even be mandated by law. Legal scholars and the United States Supreme Court have recognized the purpose of punishment as related to government-sanctioned aggression.

The amygdala is intimately involved in aggression.⁴⁵ The amygdala initiates aggressive behavior in human and other mammals, and its involvement in aggression is linked to the racial-bias studies involving the amygdala. Higher levels of amygdala activation for African-American faces will likely result in higher levels of aggression. However, the level of activation is only one aspect of the amygdala reaction. The length of the neuropathway is also implicated in aggression for the amygdala.

The amygdala may be activated by a series of preceding

41. See Eberhardt *et al.*, *supra* note 29, stating:

Even when statistically controlling for a wide variety of nonracial factors that may influence sentencing, numerous researchers have found that murderers of White victims are more likely than murderers of Black victims to be sentenced to death [citations omitted]. The U.S. GAO (1990) has described this race-of-victim effect as "remarkably consistent across data sets, states, data collection methods, and analytic techniques" [citation omitted]. African-Americans have historically been sentenced to the death penalty disproportionately particularly for the crime of interracial rape.

See also Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELINQ. 132 (1969); Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97 (1972).

42. See LAURIE L. LEVENSON, ALEX RICCIARDULLI, CALIFORNIA CRIMINAL LAW, THE EXPERT SERIES (2008), stating:

In 1976, the California legislature enacted the Determinate Sentencing Law, establishing that punishment should be the purpose of imprisonment rather than rehabilitation. The California Determinate Sentencing Law states:

"The Legislature finds and declares that the purpose of imprisonment is punishment." Citing California Penal Code Section 1170 (a).

By this action, California became the first state in the nation to declare retribution to be the official object of punishment for crime. [Emphasis added.]

43. See Craig A. Anderson & L. Rowell Huesmann, *Human Aggression:*

A Social-Cognitive View 296, 298 in THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY, CONCISE STUDENT EDITION (Michael A. Hogg & Joel Cooper eds., 2007), stating:

We define human aggression as *behavior directed towards an individual carried out with the approximate (immediate) intent to cause harm*. Furthermore the perpetrator must believe that the behavior will harm the target, and that the target is motivated to avoid the behavior. Actual harm is not required. [Citing ROBERT A. BARON, DEBORAH R. RICHARDSON, HUMAN AGGRESSION (2d ed. 2004); RUSSELL G. GEEN, HUMAN AGGRESSION (2d ed. 2001); LEONARD BERKOWITZ, AGGRESSION—ITS CAUSES, CONSEQUENCES, AND CONTROL (1993); and Brad J. Bushman & Craig A. Anderson, *Media Violence and the American Public: Scientific Facts Versus Media Misinformation*, 56 AM. PSYCHOL. 477 (2001).]

44. WAYNE R. LAFAYE, CRIMINAL LAW, HORNBOOK SERIES (4th ed. 2003).

45. See Ralph Adolphs, Daniel Tranel, Hanna Damasio & Antonio R. Damasio, *Fear and the Human Amygdala*, 75 J. NEUROSCIENCE 5879 (1995), stating:

Studies of the amygdala in humans have come largely from two sources: surgical lesions and electrical stimulation. Although surgical lesions of the human amygdala suffer from the drawback that they may be incomplete, and that the subjects may not be normal prior to the surgery [citations omitted], a review of these cases [citation omitted] strongly supports the role of the amygdala in processing fear and aggression and in social behavior.

steps. The longer path to the amygdala begins at the thalamus, proceeds through the sensory cortex, and then reaches the amygdala. The sensory cortex “weeds out” extraneous or inappropriate considerations and recognizes subtleties before the amygdala is activated. For instance, a face that is not smiling may be seen as angry or simply unhappy. If the observer is able to maximize the number of steps before initiating aggression, he will consider the possibility that the person is not smiling because the person is on trial for a crime, and is therefore scared and possibly depressed.

However, when a person has a predisposition to find certain faces to be threatening or to conclude that certain individuals should invoke aggression, the brain will take a neuro-pathway “shortcut.” The thalamus will activate and then the amygdala will activate, skipping the sensory cortex.⁴⁶ Thus, fewer extraneous components will be weeded out of the decision-making process and more subtleties will be missed. A person who is not smiling may be seen, unconsciously, as angry or hostile instead of scared and sad. This neuro-shortcut increases the likelihood that otherwise non-threatening faces will be seen as threatening and will initiate a higher level of aggression.

Increased hostility and increased aggression have been shown in studies utilizing race as a factor. A recent study demonstrates that African-Americans, independent of circumstances, engender hostility in individuals from other groups. In an experiment conducted at New York University, participants were required to engage in the boring task of counting circles flashed in a computer screen.⁴⁷ They were to record whether or not an odd or even number of circles appeared on the screen, and after they counted the number of circles and recorded the answer, yet another picture of circles would appear on the screen for them to count and record. As they proceeded with the task, pictures were flashed subliminally on the computer screen. For some of the participants, a picture of a young African-American man was flashed subliminally; and for another, a picture of a young Caucasian man was flashed. After the participants counted the circles on 130 consecutive slides flashed in the screen, the computer crashed. The participants were told that all of the data had been lost and they would be required to begin the exercise again.

The researchers then meticulously measured the level of hostility demonstrated by each group after the computer crashed. Three individuals, including 2 who were blind to condition, used a unipolar scale of hostility ranging from 0 to 10 to rate the participants. All of the individuals who rated the participants consistently concluded that those who saw the subliminal African-American male pictures during the counting task were more hostile than those who saw the Caucasian male pictures.

Increased hostility toward an individual defendant, not engendered by the evidence, creates an additional barrier to fair treatment under the law. It could inspire a judge to unknowingly impose more severe retribution for a criminal act. It may also decrease a judge’s willingness to exercise his discretion to ensure due process, such as allowing for certain witnesses, providing sufficient latitude during questioning, and sustaining or denying motions in limine so that certain evidence is admitted or excluded.

Individuals who are seen as pathological or who have the proclivity to commit crimes will be seen as less able to respond to rehabilitative efforts.

IV. REHABILITATION

While retribution requires assessment of culpability, the analysis for rehabilitation requires a determination of whether the convicted criminal’s character is resilient enough that he can refrain from committing crimes in the future. Rehabilitation can be viewed as increasing a prison sentence under the guise that the time in prison causes a convicted criminal to change and improve behavior. This theory has been roundly rejected by legislatures and many judges. Conversely, rehabilitation can be viewed as the rationale for imposing probation, counseling, anger management, educational, and job-skill programs—correspondingly reducing the length of time in prison.⁴⁸ Under either view of retribution, if a defendant is seen as less amenable to change, he will receive more time in prison. Individuals who are seen as pathological or who have the proclivity to commit crimes will be seen as less able to respond to rehabilitative efforts. If the criminal is seen as having an endemic criminal nature, then he cannot be rehabilitated. Just as in the analysis for incapacitation, rehabilitation is also linked to dangerousness and potential threat. Those who are inherently more dangerous and pose a greater potential threat are less likely to respond to rehabilitation efforts.

AFRICAN-AMERICANS, NEGATIVE CONCEPTS, AND CRIME

Researchers have attempted to determine whether there is an implicit association between African-Americans and crime, and to determine if African-Americans are seen as having an endemic criminal nature. In a study conducted at Stanford University, researchers first primed the participants with either a picture of an African-American male or a Caucasian male (a third control group received no priming

46. M. Fendt & M.S. Fanselow, *The Neuroanatomical and Neurochemical Basis of Conditioned Fear*, 23 *NEUROSCIENCE & BIOBEHAVIORAL REV.* 743 (1999).

47. John A. Bargh, Mark Chen & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation*

on Action, 71 *J. PERSONALITY & SOC. PSYCHOL.* 230 (1996).

48. *Id.* See O’Hear, *supra* note 9; see also DRESSLER, *supra* note 9: “A rehabilitative sentence will involve some form of therapy, treatment, or training to help address the underlying causes of criminal behavior.”

Participants primed with the African-American face were able to correctly identify the crime-related objects more quickly

images).⁴⁹ After the participants were primed, they were shown degraded images of various objects. Some of the objects were crime related: guns, knives, and handcuffs. Other objects were not crime related, such as a suitcase and a piece of fruit. Each image was initially shown in a blurry state—so blurry that the object could not be identified.

But with each advancing frame, the image on the screen became increasingly clear.

However, there was a significant difference in how quickly participants could identify the crime-related objects based upon the priming mechanism used. Participants primed with the African-American face were able to correctly identify the crime-related objects more quickly than the non-crime-related objects. Crime-related objects were identified on average by the 18th frame when subjects were primed with the African-American face (non-crime-related objects were identified at approximately the 23rd frame). It would be reasonable to assume that the subjects primed with the Caucasian face would identify the crime-related and non-crime-related objects in the same way as the subjects primed with the African-American face. However, the subjects identified the non-crime-related objects at almost the same frame (24th) on average (compared to 23rd for the non-crime related objects) as the subjects who were not primed and the subjects who were primed with the African-American face. However, subjects primed with the Caucasian face were not able to identify the crime-related object until approximately the 27th frame, almost 10 frames later than the group primed with the African-American face and 4 frames later than the participants who were not primed with any pictures. The Caucasian face actually *diminished* the subjects' ability to identify the crime-related objects. Notably, participants who were not primed with any faces identified both the crime-related and non-crime-related objects at approximately the 23rd frame.

Surprisingly, this result demonstrated two important concerns. First, the participants needed far less information to conclude that crime was at issue when they were thinking about African-American males. Second, the participants resisted drawing the conclusion that crime was at issue when they were still thinking about Caucasian male faces. African-Americans are not just more closely associated with crime in the eyes of their Caucasian counterparts, and therefore at risk of receiving higher sentences; being Caucasian provides a bonus or advantage, so that the imposition of a Caucasian defendant will cause the decision maker to avoid the conclusion that crime is at issue. By extension, it will require less information or evidence for a judge or jury to conclude that an African-American person is related to alleged criminal

activity. The burden of proof is higher for a Caucasian defendant under this theory and the burden of proof is lower for African-Americans.

WEAPONS IDENTIFICATION TEST

In another experiment, the participants were required to engage in a quick-reaction, computerized test to quickly and accurately identify pictures of both construction-related tools and guns—the Weapons Identification Task (WIT). The participants were primed with a picture of either an African-American or a Caucasian male face. The picture of the face would flash on the screen and would be immediately followed by a picture of a tool or a gun. The participants would then be required to quickly press a pre-assigned keyboard key to indicate whether they had seen a gun or a tool. If they took too long to identify the gun or tool, the screen would post a message saying they had run out of time for that particular identification. Just as with the Race IAT, the computer recorded the number of errors that the participant made and the amount of time in milliseconds that it took the participant to respond after each picture of the gun or the tool was flashed onto the screen. Participants were required to identify over 100 pictures during the exercise.

The researchers found overwhelmingly that participants were more likely to mistake the tool for a gun immediately after they saw the picture of an African-American face flashed on the screen. They also found that the participants were more likely to mistake a gun for a tool immediately after they saw the picture of a Caucasian face flashed on the screen.

Additionally, the researchers found that the responses were differentially delayed. Participants took longer to identify the pictures of tools when they followed an African-American face than when they followed a Caucasian face. Additionally, participants took longer to identify the picture of a gun when it was followed by a Caucasian face than when it followed an African-American face. The researchers concluded that the pictures of the African-American faces facilitated the responses to guns and interfered with the responses to tools.

These studies have disturbing implications for the criminal justice system. If finders of fact more quickly and easily analyze, recognize, and associate images of crime objects when primed with faces of African-Americans than with Caucasians, the association of crime objects as evidence to certain defendants may occur with greater ease as well. Moreover, if viewing a Caucasian face diminishes a person's ability to see, recognize, and associate crime objects, being Caucasian affords an impermissible advantage.

If a judge sees a defendant as closely linked with crime regardless of the facts of the case, regardless of the indications that he can be rehabilitated, the judge might be less likely to apply rehabilitation as a potential solution to criminal behavior. A defendant who is endemically criminal cannot be easily changed, so rehabilitation efforts would be wasted on such a

49. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie, & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J.

defendant. Therefore, the use of rehabilitation as a counterbalance to the length of incapacitation would be folly.

SHOOT NO-SHOOT TEST

In addition to assessing endemic criminal behavior, the rehabilitation analysis is also closely aligned with the assessment of threat. The prior discussion of threat assessment and its neurophysiologic correlates reveals a striking racial disparity. A recent study reveals how racial bias concurrently affects threat assessment and conclusions that African-Americans are endemically criminal.

In the Shoot No-Shoot test, conducted at the University of Chicago, pictures of African-American and Caucasian men in various poses are flashed on the computer screen.⁵⁰ In each picture, the person depicted is holding either a gun, a cell phone, or a soda can. The test subjects, or “players,” must as quickly as possible press a key on the computer keyboard to indicate that they will either “shoot” or “not shoot” the man in the picture. They are directed to hit the designated keyboard key to “shoot” if they believe that the man has a gun, or to hit the key for “no shoot” if they believe that the man in the picture has a soda can or a cell phone. As with the other reaction-time-measure tests mentioned in previous studies, the computer measures the length of time it takes the player to respond in milliseconds and records the number of errors.

Previous studies have repeatedly found that the overwhelming majority of players take longer to determine that the African-American man is holding a soda can or a cell phone than it takes them to make the same determination for the Caucasian man. Likewise, the overwhelming majority of players will make more mistakes and “shoot” the African-American man when he is not holding a gun than they will when deciding to shoot or not shoot the Caucasian man.

While the other studies demonstrated that the Caucasian participants showed a stronger association between crime, threat, or fear and African-Americans, this study demonstrates that that association led to differential action. The subjects in this study were required to make a choice that, while simulated, served as a protective measure in response to a potential or perceived threat. Arresting, charging, convicting, and sentencing individuals are all protective measures taken in response to potential or perceived threats. If associations cause people to take more severe protective measures, those concerned with fairness must become increasingly concerned about whether there is differential application of the laws to African-Americans in the criminal justice system.

DETERRENCE

In setting prison sentences, a judge must determine how long each defendant would need to be in prison to deter him from future criminal behavior. The United States Code states that a judge “shall consider” in determining a sentence how

the sentence will “afford adequate deterrence to criminal conduct.”⁵¹

Numerous economists have treated a judge’s decision-making process on deterrence as a calculation that involves the weighing of factors and setting of values.⁵² A judge will likely take into account whether or not a defendant will be partially deterred by the defendant’s own ethical considerations, his remorse for the injury he has caused, and his discomfort in a prison setting. Ethical considerations, remorse for injuring another being (regardless of the potential recourse), and the ability to reason in advance to avoid repercussions are primarily human attributes. Conversely, if a judge were seeking to deter a household pet from rule breaking, he would decide that the pet’s ethical considerations and remorse for rule breaking were minimal and the pet’s ability to reason through repercussions would be based on the judge repeatedly punishing the pet in the past. This is not to equate any defendant with a pet. Rather the example is designed to demonstrate the extremes of human encoding. In practice human encoding occurs on a continuum as opposed a binary state. To make these determinations about a defendant in a criminal case, a judge must create a neurophysiologic reaction in his own brain to encode the defendant as more or less human. The judge also must activate the neural substrates that come online when predicting the behavior and assessing the social values of individuals. Therefore, to determine the necessary level of deterrence and set the proper length of a prison sentence accordingly, the judge must activate the neurophysiologic process in earnest for encoding humanness and assessing values. Herein lies the problem. The activation of the encoding process may occur in significantly different ways based on the defendant’s attributes. And the activation of the neural substrates will occur differently if the judge sees the defendant as similarly situated to himself.

The assessment of the necessary level of deterrence is based upon a series of determinations. In an ordered society, the presumption is that most actors will engage in a rational thought process when faced with a choice of committing a crime or not, and that they will ultimately arrive at the decision to comply with the law and avoid causing injury to others. This internal mechanism, in conjunction with the concern that a criminal penalty will be imposed, prevents most people, most of the time, from engaging in criminal activity. Additionally, current sentencing law assumes that criminal or deviant acts guided by an “end/means calculation” will be dictated by the value system of the actor. Before the actor commits a crime, he has identified a potential benefit or pleasure to be derived from engaging in a

[T]he activation of the neural substrates will occur differently if the judge sees the defendant as similarly situated to himself.

50. Joshua Correll, Bernadette Park, Charles M. Judd, & Bernd Wittenbrink, *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002).

51. 18 U.S.C. 3553(a)(2)(B) (1984).

52. Isaac Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation and Deterrence*, 71 AM. ECON. REV. 307 (1981).

**The conundrum
for a judge is
whether or not
there are hidden
factors in the
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making process**

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criminal act. Even if the actor seems to commit the crime with very little prior analysis, he has at least quickly considered the basic outlines of the potential benefits or reward for engaging in the criminal act. Even if he decides quickly, he will compare the cost or pain that may result from the act to the potential benefit. This analysis will prevent the actor

from proceeding or it will inspire the actor to proceed.

The guilt from causing another person injury or pain will serve as a cost to the person who is able to feel for other human beings and to empathize when seeing others in pain. The more he is able tap into this feeling of human empathy, the greater the cost of injuring another person. It is this sense of empathy, the caring for others, the guilt at injuring a stranger, that some philosophers and theologians claim makes us human and sets us aside from others in the animal kingdom.

If the actor does not conclude that causing pain to others is a significant cost, it may be that the actor does not feel pain or suffer emotional detriment when hurting others. Moreover, if the actor derives pleasure from causing pain, the process of hurting another person through violence or the taking of property will be seen as a benefit and will skew the calculation significantly.

If the apprehension against engaging in criminal behavior is not internally derived through sufficient moral character, empathy, or “humanness,” the motivation must be derived externally. The possibility of apprehension and punishment or retribution for engaging in acts that cause others pain will mitigate against the benefit as perceived by the actor. However, the more deviant the actor’s analysis of benefit (i.e., the more he derives pleasure from pain or, conversely, the less he derives pain or perceives cost when he injures others), the greater the punishment required to tip the scales against engaging in criminal behavior. If internal motivation or deterrence (i.e., morality or human empathy) to avoid criminal behavior is low, then the level of external motivation or deterrence (i.e., the sentence) must necessarily be higher. Therefore, it will take a more severe sentence to balance the decision-making process of a person with low internal motivation or reduced “human empathy.”

When a judge is determining an appropriate sentence, the

analysis regarding the internal and external motivations of a defendant must be considered. The lower the internal motivation to avoid criminal activity, the more dangerous the individual may be, or, minimally, the more likely the individual may be to engage in future criminal activity. So the object of increased punishment is to increase external deterrence for those *without* the requisite “humanness,” “ethical proclivities,” or “moral commitments” to achieve sufficient internal deterrence.⁵³

The conundrum for a judge is whether or not there are hidden factors in the judge’s decision-making process, motivating the judge to increase the sentences for some individuals but not others. If a judge presumes that some defendants that come before his court are less able to engage in internal deterrence, the defendant may receive a higher penalty to achieve the balance in the actor’s cost-benefit analysis. However, if that assessment of “humanness,” “ethical proclivities,” or “moral commitment” is based on factors outside of the evidence presented in court, the sentencing process falls outside of the bounds of law.

UNCONSCIOUS DEHUMANIZATION OF MARGINALIZED GROUPS

In a study conducted at Princeton University, participants were required to make judgments about people whom they had not met previously but who were described as having particular attributes. As the participants made the judgments about each person, their brains were scanned using fMRI. There were three people described: 1) a person who was socioeconomically disadvantaged (i.e., homeless people); 2) an IV-drug user; and 3) a person who was not addicted to drugs and who was presumably middle class.⁵⁴ While making the judgments, the participants used a distinctly different part of their neuro-anatomy for the stigmatized groups (i.e., IV-drug users and homeless people) than for the non-stigmatized groups. The participants specifically failed to use the portion of the brain, the medial prefrontal cortex (mPFC) that is necessary for encoding individuals as social beings.⁵⁵ If we fail to use the mPFC to consider and judge individuals, we have effectively dehumanized them. The mPFC allows us to process exclusively human emotions for others, such as pity and pride.⁵⁶ If we are not activating our mPFC when considering certain individuals from particular social categories, we are not feeling exclusively human emotions such as pity or pride for them.⁵⁷

This process of dehumanizing “others” is likely more pro-

53. “[T]he debate among criminal law theorists as to how best to capture an agent’s culpability reflects the tension between a focus on grammar and a focus on meaning. An emphasis on particular mental state terms, such as intention or belief, values the individual parts of an agent’s decision-making. This grammatical focus leads to descriptive *mens rea* terminology. In contrast, those who focus upon the overall blameworthiness of an actor’s choice—its wickedness, indifference, and the like—focus upon the meaning of the actor’s choice. From this perspective, our *mens rea* terminology is decidedly normative. The question of whether to focus on descriptive *mens rea* or normative *mens rea* is a debate about whether to focus on the parts or whether to focus on the whole.” Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV.

2523, 2523-2524 (2007).

54. Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847 (2006).

55. Susan T. Fiske, Amy J.C. Cuddy, & Peter Glick, *Universal Dimensions of Social Perception: Warmth and Competence*, 11 TRENDS COGNITIVE SCI. 77 (2006).

56. Paul Rozin & April E. Fallon, *A Perspective on Disgust*, 94 PSYCHOL. REV. 23 (1987).

57. In a study of one jurisdiction’s probation presentence reports in juvenile-court cases, researchers found that probation officers tended to portray the delinquency of black youth as stemming from negative attitudinal and personality traits, while portrayal of

nounced when the otherness is based on race and, undoubtedly, potentiated when race and socioeconomic factors are combined. Socioeconomically disadvantaged defendants may be relegated to the realm of “other” by those who have achieved privilege, which may indeed include judges. However, the combination of socioeconomic disadvantage and marginalized racial identity, such as with African-Americans, would likely create an even more stark result. This increase level of dehumanization is based upon the specific animal association held in the unconscious minds of many in the United States.

A study from Stanford University demonstrated that many Caucasians in the United States more closely associate African-Americans with apes than they do with their Caucasian counterparts. In their study, participants were primed with either a picture of an African-American male or a Caucasian male (a third control group received no priming images).⁵⁸ The participants were then shown blurred images of various animals, including peacocks and apes. The initial frame was so blurry that it could not be identified, but with each advancing frame, the object became more distinct. When the image reached the 32nd frame, it was completely identifiable. However, most people were able to identify each of the animals by the 16th frame. But there was a significant difference in how quickly participants could identify the apes, versus the other animals, based upon the priming mechanism used.

Participants primed with the African-American face were able to correctly identify the picture of the ape more quickly than the other animals. Participants primed with the Caucasian face, and those who were not primed, were not able to identify the ape earlier than any of the other animals.

The association between African-Americans and apes has been advanced repeatedly in both overt and subtle ways. There is a long history of the association being used to justify the oppression and increased punishment of African-Americans, immigrants, and Jewish people during the Holocaust.⁵⁹ Historically, those who are stigmatized as less than human often receive a less rigorous application of moral considerations and rules.⁶⁰

If African-Americans are more closely associated with apes than are their Caucasian counterparts, African-Americans are seen as more closely linked with the key aspects of apes as compared to humans. African-Americans are seen by many, whether or not they realize it, to be less able to control impulses, more likely to engage in violent behavior, and lack-

ing a fully functional internal moral code.

While increased hostility increases the motivation to impose a more severe sentence, and thus ensure greater retribution, decreased humanity exacerbates this effect. More severe retribution can be imposed when the decision maker does not socially categorize a defendant as human. If a judge cannot activate the mPFC effectively to apply exclusive human emotions to a defendant, extenuating or mitigating circumstances for the act may not be factored into a sentencing decision. Additionally, if a judge sees a defendant as less than human, the judge may be unable to activate the mPFC to apply the principle of rehabilitation. Programs that allow for reintegration into society, therapeutic options, or community support may be seen by a judge as inapplicable to someone without the requisite human attributes to be capable of being rehabilitated. If a judge's neurophysiologic reaction to an African-American defendant is one of fear, threat, and distrust, then the sentencing principle of incapacitation becomes ever-more important as the judge determines the length of the sentence. Additionally, the strong association between African-American faces and crime objects will solidify the conclusion that the defendant is a criminal and belongs in prison. *A less-than-human, threatening, untrustworthy defendant who is automatically associated with negative concepts and crime cannot be easily deterred from committing crimes in the future. And a defendant who engenders increased hostility in a judge is at a distinct disadvantage throughout a criminal trial and at the time of sentencing.* More severe penalties may be imposed to ensure that someone without the requisite internal motivation and with the proclivity to engage in criminal behavior does not offend again. The end result—African-Americans, all other factors being equal, would likely receive longer sentences than their Caucasian counterparts due to the neurophysiologic reactions related to implicit biases in the mind of a judge.

Of course, evidence that demonstrates innocence or the presence of factors that may mitigate against a severe sentence would presumably override bias in the courtroom. However, if executive functioning is diminished, the decision maker's ability to “think past” the biases may be impaired. It may take more evidence to counter the negative associations. The African-American defendant may be required to present more

It may take more evidence to counter the negative associations.

white youth stressed the influence of the social environment. Black youth were judged to be more dangerous, which translated into harsher sentences than for comparable white youth. ASHLEY NELLIS, JUDY GREENE, & MARC MAUER, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2008) (citing George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms of Juvenile Offenders*, 63 AM. SOC. REV. 554 (1998)).

58. Philip Atiba Goff, Jennifer L. Eberhardt, Melissa J. Williams, & Matthew Christian Jackson, *Not Yet Human: Implicit Knowledge,*

Historical Dehumanization, and Contemporary Consequences, 94 J. PERSONALITY & SOC. PSYCHOL. 292 (2008).

59. FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES (1990); GEORGE M. FREDRICKSON, RACISM: A SHORT HISTORY (2002); OTTO SANTA ANA, BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE (1999); Gustav Jahoda, *Images of Savages: Ancient Roots of Modern Prejudice in Western Culture*, 102 AM. ANTHROPOLOGIST 394 (2008).

60. Susan Opatow, *Moral Exclusion and Injustice: An Introduction*, 46 J. SOC. ISSUES 1 (1990).

evidence, and more reliable evidence, than his Caucasian counterpart to be acquitted or to receive a similar sentence for the same crime. Such an outcome would be abhorrent in the eyes of the justice system. Consequently, while many judges will admit that implicit bias exists and that they may hold certain biases, they remain convinced that their thoughtful and rigorous process of decision making as well as the application of the evidence rules and the penal code will minimize the effects of the bias.

CONCLUSION

Simply saying that neurophysiologic processes implicated in bias affects criminal sentencing is a gross over-simplification. Instead we must recognize that there are multiple aspects of decision making that increase the level of bias in legal analysis. These aspects potentiate the assessment of fear, threat, and aversion; increase the level of aggression; decrease pain empathy for African-Americans and encoding of African-Americans as human; and decrease the use of portions of the brain that use information other than bias to reach conclusions about individuals. Understanding the complexity of the forces affecting judges as they hand down sentences allows the policy-makers to devise more effective solutions. Assuming that judges can simply try harder to be fair, take more time when making decisions, or utilize their egalitarian

value systems to eliminate bias in their decision-making process is naïve. The solutions should be tailored to the neurophysiologic reactions and the psychological processes that infuse bias into the sentencing decisions. As judges and legislators across the country become more amenable to change, these solutions will be instituted. However, acceptance of the implicit bias, the neuro-scientific correlates, and their role in the sentencing process is the first step.



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Addressing Implicit Bias in the Courts

Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek¹

Fairness is a fundamental tenet of American courts. Yet, despite substantial work by state courts to address issues of racial and ethnic fairness,² public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread.³ Why?

THE INFLUENCE OF IMPLICIT ASSOCIATIONS

Perhaps one explanation may be found in an emerging body of research on implicit cognition. During the last two decades, new assessment methods and technologies in the fields of social science and neuroscience have advanced research on brain functions, providing a glimpse into what National Public Radio science correspondent Shankar Vedantam refers to as the “hidden brain.”⁴ Although in its early stages, this research is helping scientists understand how the brain takes in, sorts, synthesizes, and responds to the enormous amount of information an individual faces on a daily basis.⁵ It also is providing intriguing insights into how and why individuals develop stereotypes and biases, often without even knowing they exist.

The research indicates that an individual's brain learns over time how to distinguish different objects (e.g., a chair or desk) based on features of the objects that coalesce into patterns.

These patterns or schemas help the brain efficiently recognize objects encountered in the environment. What is interesting is that these patterns also operate at the social level. Over time, the brain learns to sort people into certain groups (e.g., male or female, young or old) based on combinations of characteristics as well. The problem is when the brain automatically associates certain characteristics with specific groups that are not accurate for all the individuals in the group (e.g., “elderly individuals are frail”). Scientists refer to these automatic associations as implicit—they operate behind-the-scenes without the individual's awareness.

Scientists have developed a variety of methods to measure these implicit attitudes about different groups, but the most common measure used is reaction time (e.g., the Implicit Association Test, or IAT).⁶ The idea behind these types of measures is that individuals will react faster to two stimuli that are strongly associated (e.g., elderly and frail) than to two stimuli that are less strongly associated (e.g., elderly and robust). In the case of race, scientists have found that most European Americans who have taken the test are faster at pairing a white face with a good word (e.g., honest) and a black face with a bad word (e.g., violent) than the other way around. For African-

Footnotes

1. The Open Society Institute, the State Justice Institute, and the National Center for State Courts funded the preparation of this article. The views expressed are those of the authors and do not necessarily reflect the views of the funding organizations. This article summarizes the National Center for State Courts' project on implicit bias and judicial education. For the full report of the project, see PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II & JENNIFER K. ELEK, *HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION* (2012) (hereinafter *HELPING COURTS*), available at http://www.ncsconline.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx.
2. Various state-court reports of racial fairness task forces and commissions can be found through the National Center for State Courts' website at http://www.ncsconline.org/Projects_Initiatives/REFI/SearchState.asp. To access the National Center for State Courts' Interactive Database of State Programs to address race and ethnic fairness in the courts, go to http://www.ncsconline.org/D_Research/ref/programs.asp.
3. For example, a 1999 national survey of public attitudes about state courts found 47% of Americans surveyed did not believe that African-Americans and Latinos receive equal treatment in America's state courts, 55% did not believe that non-English-speaking persons receive equal treatment, and more than two-thirds of African-Americans thought that African-Americans received worse treatment than others in court. See NATIONAL CENTER FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY* (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_Public

[ViewCrtPub.pdf](#). State surveys, such as the public-opinion survey commissioned by the California Administrative Office of the Courts, report similar findings: A majority of all California respondents stated that African-Americans and Latinos usually receive less favorable results in court than others, approximately two-thirds believed that non-English speakers receive less favorable results, and, a much higher proportion of African-Americans, 87%, thought that African-Americans receive unequal treatment. See David B. Rottman, *Trust and Confidence in the California Courts: A Survey of the Public and Attorneys* (2005), available at <http://contentdm.ncsconline.org/cgi-in/showfile.exe?CISO-ROOT=/ctcomm&CISOPT=25>.

4. See SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* (2010).
5. Social-science research on implicit stereotypes, attitudes, and bias has accumulated across several decades into a compelling body of knowledge and continues to be a robust area of inquiry, but the research is not without its critics. See *HELPING COURTS*, *supra* note 1, Appendix B (“What Are the Key Criticisms of Implicit Bias Research?”). There is much that scientists do not yet know. This article and the full report on which it is based are offered as a starting point for courts interested in exploring implicit bias and potential remedies, with the understanding that advances in technology and neuroscience promise continued refinement of knowledge about implicit bias and its effects on decision making and behavior.
6. See *HELPING COURTS*, *supra* note 1, Appendix B (“How Is Implicit Bias Measured?”), for more information on measures of implicit bias.

Americans, approximately a third show a preference for African-Americans, a third show a preference for European Americans, and a third show no preference.⁷

There is evidence that judges are susceptible to these implicit associations, too. One survey of judges found a strong white preference on the IAT among white judges. Black judges also followed the general population findings, showing no clear preference overall (44% showed a white preference but the preference was weaker overall).⁸

The question is whether these implicit associations can influence, *i.e.*, bias, an individual's decisions and actions, and there is growing evidence that the answer is yes. Research has demonstrated that implicit bias can affect decisions regarding, for example, job applicants,⁹ medical treatment,¹⁰ a suspect's dangerousness,¹¹ and nominees for elected office.¹²

Law professor Jerry Kang gave this description of the potential problem this poses for the justice system:

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense?¹³

The problem is compounded by judges and other court professionals who, because they have worked hard to eliminate explicit bias in their own decisions and behaviors, assume that they do not allow racial prejudice to color their judgments. For example, most, if not all, judges believe that they are fair and objective and base their decisions only on the facts of a case (in one study, for example, 97% of judges attending an educational program rated themselves in the top half of the attendees—statistically impossible—in their ability to “avoid racial prejudice

in decisionmaking”¹⁴). Judges and court professionals who focus only on eliminating explicit bias may conclude that they are better at understanding and controlling for bias in their decisions and actions than they really are.

Law professor and social psychologist Jeffrey Rachlinski, Judge Andrew Wistrich, and law professors Chris Guthrie and Sheri Lynn Johnson also found preliminary evidence that implicit bias affected judges' sentences. Additional research is needed to confirm these findings. More importantly for the justice system, though, is their conclusion that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”¹⁵ The next section discusses potential strategies judges and court professionals can use to address implicit bias.

REDUCING THE INFLUENCE OF IMPLICIT BIAS

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual's work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful.¹⁶ To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small-group discussion with judges and judicial educators (referred to here as the Judicial Focus Group) to discuss potential strategies. These efforts yielded seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions.¹⁷

Strategy 1: Raise awareness of implicit bias. Individuals can only work to correct for sources of bias that they are aware

7. See Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 956-58 (2006).

8. See Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich, & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1209-11 (2009).

9. See, e.g., Marianne Bertrand & Sendhi L. Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AMER. ECON. REV. 991 (2004); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553 (2005).

10. See, e.g., Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni, & Mahzarin R. Banaji, *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).

11. See Joshua Correll, Bernadette Park, Charles M. Judd, & Bernard Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314 (2002); Joshua Correll, Bernadette Park, Charles M. Judd, Bernard Wittenbrink, Melody S. Sadler, & Tracie

Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1006 (2007).

12. See Anthony G. Greenwald, Colin T. Smith, N. Sriram, Yoav Bar-Anan, & Brian A. Nosek, *Implicit Race Attitudes Predicted Vote in the 2008 U.S. Presidential Election*, 9 ANALYSES SOC. ISSUES & PUB. POL'Y 241 (2009); B. Keith Payne, Jon A. Krosnick, Josh Pasek, Yphtach Leikes, Omair Ahktar, & Trevor Thompson, *Implicit and Explicit Prejudice in the 2008 American Presidential Election*, 46 J. EXPERIMENTAL PSYCH. 367 (2010).

13. JERRY KANG, *IMPLICIT BIAS: A PRIMER FOR COURTS 2* (NAT'L CTR. FOR STATE COURTS 2009).

14. See Rachlinski et al., *supra* note 8, at 1225-26.

15. See Rachlinski et al., *supra* note 8, at 1221.

16. See Nilanjana Dasgupta, David DeSteno, Lisa A. Williams, & Matthew Hunsinger, *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009).

17. For more information about the strategies, see HELPING COURTS, *supra* note 1, Appendix G.

Strategy 1: Potential Actions to Take

- Individual: Seek information on implicit bias by attending educational sessions, taking the IAT, and reading relevant research.
- Courts: Provide education on implicit bias that includes judicial facilitators/presenters, examples of implicit bias across other professions, and exercises to make the material more personally relevant.

exist.¹⁸ Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action.¹⁹ Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place,²⁰ it is a crucial starting point that may prompt individuals to seek out and implement additional strategies.

Strategy 2: Seek to identify and consciously acknowledge real group and individual differences.

The popular “color blind” approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit-bias intervention strategy. “Color blindness” actually produces greater implicit bias than strategies that acknowledge race.²¹ Cultivating greater awareness of and sensitivity to group and individual differences appears to be a more effective tactic: Training seminars that acknowledge and promote an appreciation of group differences and multicultural viewpoints can help reduce implicit bias.²²

Diversity-training seminars can serve as a starting point from which court culture itself can change. When respected court leadership actively supports the multiculturalism approach, those egalitarian goals can influence others.²³ Moreover, when an individual (e.g., a new employee) discovers that peers in the court community are more egalitarian, the individual’s beliefs become less implicitly biased.²⁴ Thus, a system-wide effort to cultivate a workplace environment that sup-

Strategy 2: Potential Actions to Take

- Individual: Participate in diversity training that focuses on multiculturalism, associate with those committed to egalitarian goals, and invest effort in identifying the unique characteristics of different members of the same minority groups.
- Courts: Provide routine diversity training that emphasizes multiculturalism and encourage court leaders to promote egalitarian behavior as part of a court’s culture.

ports egalitarian norms is important in reducing individual-level implicit bias. Note, however, that mandatory training or other imposed pressure to comply with egalitarian standards may elicit hostility and resistance from some types of individuals, failing to reduce implicit bias.²⁵

In addition to considering and acknowledging group differences, individuals should purposely compare and individuate stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced.²⁶

Strategy 3: Routinely check thought processes and decisions for possible bias. When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing. (Bodenhausen, 1990). As a result, low-effort decision makers tend to develop inferences or expectations about an individual early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment.²⁷ Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the

18. See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCH. BULL. 117 (1994).

19. Cf. Green et al., *supra* note 10, at 1237 (finding support for the IAT as an educational tool because most resident physicians were “open to the idea that unconscious biases could affect their clinical decisions, and that learning more about these biases could improve their care of patients” and that physicians who were aware of the study’s focus seemed to modulate the effects of implicit bias on their treatment decisions).

20. See Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCH. Q. 83 (2003).

21. See Evan P. Apfelbaum, Samuel R. Sommers, & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Strategic Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCH. 918 (2008).

22. See Laurie A. Rudman, Richard D. Ashmore, & Melvin L. Gary, “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCH. 856 (2001); Richard J. Nussbaum & Jennifer A. Richeson, *The Impact of Multiculturalism Versus Color-Blindedness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCH. 417 (2004).

23. See Henk Aarts, Peter M. Gollwitzer, & Ran R. Hassin, *Goal*

Contagion: Perceiving Is for Pursuing, 87 J. PERSONALITY & SOC. PSYCH. 23 (2004).

24. See Gretchen B. Sechrist & Charles Stangor, *Perceived Consensus Influences Intergroup Behavior and Stereotype Accessibility*, 80 J. PERSONALITY & SOC. PSYCH. 645 (2001).

25. See E. Ashby Plant & Patricia G. Devine, *Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?*, 37 J. EXPERIMENTAL SOC. PSYCH. 486 (2001).

26. See, e.g., Maja Djikic, J. Ellen Langer, & Sarah F. Stapleton, *Reducing Stereotyping Through Mindfulness: Effects on Automatic Stereotype-Activated Behaviors*, 15 J. ADULT DEV. 106 (2008); Sophie Lebrecht, Lara J. Pierce, Michael J. Tarr, & James W. Tanaka, *Perceptual Other-Race Training Reduces Implicit Racial Bias*, 4 PLOS ONE 4, e4215 (2009); Katja Corcoran, Tanja Hundhammer, & Thomas Mussweiler, *A Tool for Thought! When Cooperative Thinking Reduces Stereotyping Effects*, 45 J. EXPERIMENTAL SOC. PSYCH. 1008 (2009).

27. See Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCH. SCI. 319 (1990); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCH. 20 (1983).

Strategy 3: Potential Actions to Take

- Individual: Use decision-support tools such as note-taking, checklists, and bench cards and techniques such as writing down the reasons for a judgment to promote greater deliberative as opposed to intuitive thinking.
- Courts: Develop guidelines and/or formal protocols for decision makers to check and correct for implicit bias (e.g., taking the other person's perspective, imagining the person is from a non-stigmatized social group, thinking of counter-stereotypic thoughts in the presence of an individual from a minority social group).

other person.²⁸ Individuals interested in minimizing the impact of implicit bias on their own judgment and behaviors should actively engage in more thoughtful, deliberative information processing. When sufficient effort is exerted to limit the effects of implicit biases on judgment, attempts to consciously control implicit bias can be successful.²⁹

To do this, however, individuals must possess a certain degree of self-awareness. They must be mindful of their decision-making processes rather than just the results of decision making³⁰ to eliminate distractions, to minimize emotional decision making, and

Strategy 4: Potential Actions to Take

- Individual: Allow more time on cases in which implicit bias might be a concern by, for example, spending more time reviewing the facts of the case before committing to a decision; consider ways to clear your mind (e.g., through meditation) and focus completely on the task at hand.
- Courts: Review areas in which judges and other decision makers are likely to be over-burdened and consider options (e.g., reorganizing court calendars) for modifying procedures to provide more time for decision making.

quickly³³ or in which the decision maker is distracted and cannot fully attend to incoming information³⁴ all limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive abilities are not similarly constrained. A decision-maker may be more likely to think in terms of race and use implicit racial stereotypes³⁵ because race often is a salient, i.e., easily-accessible, attribute. In addition, certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the

to objectively and deliberately consider the facts at hand instead of relying on schemas, stereotypes, and/or intuition.

Strategy 4: Identify distractions and sources of stress in the decision-making environment and remove or reduce them.

Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, backlogged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance.³¹ Specifically, situations that involve time pressure³² that force a decision maker to form complex judgments relatively

source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly.³⁶ Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so.³⁷

Given all these potential distractions and sources of stress, decision makers need enough time and cognitive resources to thoroughly process case information to avoid relying on intuitive reasoning processes that can result in biased judgments.

28. See Carl O. Word, Mark P. Zanna, & Joel Cooper, *The Nonverbal Mediation of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCH. 553 (2005).

29. See B. Keith Payne, *Conceptualizing Control in Social Cognition: How Executive Functioning Modulates the Expression of Automatic Stereotyping*, 89 J. PERSONALITY & SOC. PSYCH. 488 (2005); Brandon D. Stewart & B. Keith Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions as Efficient Means of Thought Control*, 34 PERSONALITY & PSYCH. BULL. 1332 (2008).

30. See Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Bias*, 42 WILLAMETTE L. REV. 1 (2006).

31. See, e.g., Tracy D. Eells & Robert C. Showalter, *Work-Related Stress in American Trial Judges*, 22 BULL. AMER. ACAD. PSYCH. & L. 71 (1994); L.R. Hartley & R.G. Adams, *Effect of Noise on the Stroop Test*, 102 J. EXPERIMENTAL PSYCH. 62 (1974); Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 J. PERSONALITY & SOC. PSYCH. 639 (1987).

32. See, e.g., Ad van Knippenberg, Ap Dijksterhuis, & Diane Vermeulen, *Judgment and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load*, 29 EURO. J. SOC. PSYCH. 191 (1999).

33. See, e.g., Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH. 871 (1987).

34. See, e.g., Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCH. 509 (1991); Jeffrey W. Sherman, Angela Y. Lee, Gayle R. Bessenoff, & Leigh A. Frost, *Stereotype Efficiency Reconsidered: Encoding Flexibility Under Cognitive Load*, 75 J. PERSONALITY & SOC. PSYCH. 589 (1998).

35. See C. Neil Macrae, Galen V. Bodenhausen, & Alan B. Milne, *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCH. 397 (1995); Jason P. Mitchell, Brian A. Nosek, & Mahzarin R. Banaji, *Contextual Variations in Implicit Evaluation*, 132 J. EXPERIMENTAL PSYCH.: GEN. 455 (2003).

36. See, e.g., Dasgupta et al., *supra* note 16; David DeSteno, Nilanjana Dasgupta, Monica Y. Bartlett, & Aida Caidric, *Prejudice from Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCH. SCI. 319 (2004).

37. See Galen V. Bodenhausen, Geoffrey P. Kramer, & Karin Susser, *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCH. 621 (1994).

Strategy 5: Potential Actions to Take

- Individual: Commit to decision-making criteria before reviewing case-specific information.
- Courts: Develop protocols that identify potential sources of ambiguity; consider the pros (e.g., more understanding of issues) and cons (e.g., familiarity may lead to less deliberative processing) of using judges with special expertise to handle cases with greater ambiguity.

Strategy 5: Identify sources of ambiguity in the decision-making context and establish more concrete standards before engaging in the decision-making process. When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever

information is most easily accessible—including stereotypes.³⁸

In cases involving ambiguous factors, decision makers should preemptively commit to specific decision-making criteria (e.g., the importance of various types of evidence to the decision) before hearing a case or reviewing evidence to minimize the opportunity for implicit bias.³⁹ Establishing this structure before entering the decision-making context will help prevent constructing criteria after the fact in ways biased by implicit stereotypes but rationalized by specific types of evidence (e.g., placing greater weight on stereotype-consistent evidence in a case against a black defendant than one would in a case against a white defendant).

Strategy 6: Institute feedback mechanisms. Providing egalitarian consensus information (i.e., information that others in the court hold egalitarian beliefs rather than adhere to stereotypic beliefs) and other feedback mechanisms can be powerful tools in promoting more egalitarian attitudes and behavior in the court community. To encourage individual effort in addressing personal implicit biases, court administration may opt to provide judges and other court professionals with relevant performance feedback. As part of this process, court administration should consider the type of judicial decision-

Strategy 6: Potential Actions to Take

- Individual: Seek feedback through, for example, participating in a sentencing round table discussing hypothetical cases or consulting with a skilled mentor or senior judge about handling challenging cases; ask for feedback from colleagues, supervisors and others regarding past performance; document and review the underlying logic of decisions to ensure their soundness.
- Courts: Periodically review a judge's case materials and provide feedback and suggestions for improvement as needed; develop a bench-bar committee to oversee an informal internal grievance process and work with judges as needed; convene sentencing round tables to discuss hypothetical cases involving implicit bias issues and encourage more deliberate thinking.

making data currently available or easily obtained that would offer judges meaningful but nonthreatening feedback on demonstrated biases. Transparent feedback from regular or intermittent peer reviews that raise personal awareness of biases could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions.⁴⁰ This feedback should include concrete suggestions on how to improve performance⁴¹ and could also involve recognition of those individuals who display exceptional fairness as positive reinforcement.

Feedback tends to work best when it (a) comes from a legitimate, respected authority, (b) addresses the person's decision-making process rather than simply the decision outcome, and (c) when provided before the person commits to a decision rather than afterwards, when he or she has already committed to a particular course of action.⁴² Note, however, that feedback mechanisms that apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias.⁴³ By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice.⁴⁴

38. See, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *Psych. Sci.* 315, 318 (2000); James D. Johnson, Erik Whitestone, Lee Anderson Jackson & Leslie Gatto, *Justice Is Still Not Colorblind: Differential Effects of Exposure to Inadmissible Evidence*, 21 *Personality & Soc. Psych. Bull.* 893-896-98 (1995).

39. See Eric L. Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 *Psych. Sci.* 474 (2005).

40. See, e.g., Leanne S. Son Hing, Winnie Li, & Mark P. Zanna, *Inducing Hypocrisy to Reduce Prejudicial Response Among Aversive Racists*, 38 *J. EXPERIMENTAL SOC. PSYCH.* 71 (2002).

41. Cf. Saaid A. Mendoza, Peter M. Gollwitzer, & David M. Amodio, *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 *PERSONALITY & SOC. PSYCH. BULL.* 512 (2010) at 512 (finding that study participants given

instructions to develop specific implementation intentions—in which a specific behavioral response is linked to an anticipated situational cue—demonstrated improved performance accuracy and less implicit stereotyping in the Shooter Task, a reaction time measure of implicit bias, compared to participants who were simply prompted with a general accuracy goal); Kim, *supra* note 20 at 91 (finding that study participants given specific instructions for trying to fake the results of an IAT were more successful than participants given no or only general instructions for faking results).

42. For a review on feedback effects, see Jennifer S. Lerner & Philip E. Tetlock, 125 *PSYCH. BULL.* 255 (1999).

43. See, e.g., Plant & Devine, *supra* note 25.

44. See Lisa Legault, Jennifer N. Gutsell, & Michael Inzlicht, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (But Also Increase) Prejudice*, 22 *PSYCH. SCI.* 1472 (2011).

Strategy 7: Potential Actions to Take

- Individual: View images (e.g., by hanging photos, creating new screen savers and desk top images) of admired individuals (e.g., Martin Luther King, Jr.) of the stereotyped social group; spend more time with individuals who are counter-stereotypic role models; practice making positive, i.e., counter-stereotypic, associations, with members of minority social groups.
- Courts: Assess visual and auditory communications for implicit bias and modify to convey egalitarian norms and present counter-stereotypic information; increase representation of stigmatized social groups in valued, authoritative roles in the court to foster positive intergroup relations and provide immediately accessible counter-stereotype examples.

Strategy 7: Increase exposure to stigmatized group members and counter-stereotypes and reduce exposure to stereotypes.

Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and “unlearn” the associations that underlie implicit bias. “Exposure” can include imagining counter-stereotypes,⁴⁵ incidentally observing counter-stereotypes in the environment,⁴⁶ engaging with counter-stereotypic role models,⁴⁷ or extensive practice making counter-stereotypic associations.⁴⁸

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace.⁴⁹

Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact.⁵⁰

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit bias. Images and language that are a part of any signage, pamphlets, brochures, instructional

manuals, background music, or any other verbal or visual communications in the court may inadvertently activate implicit biases because they convey stereotypic information.⁵¹ Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

CONCLUSION

Research shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis. Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control, and can operate even in individuals who express low explicit bias.⁵² Because implicit biases are automatic, they can influence or bias decisions and behaviors, both positively and negatively, without an individual’s awareness. This phenomenon leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair. Thus although courts may have made great strides in eliminating explicit or consciously endorsed racial bias, they, like all social institutions, may still be challenged by implicit biases that are more difficult to identify and change.

Psychology professor Patricia Devine argues that “prejudice need not be the consequence of ordinary thought processes” if individuals actively take steps to avoid the influence of implicit biases on their behavior.⁵³ Avoiding the influence of implicit bias, however, is an effortful, as opposed to automatic, process and requires intention, attention, and time. Combating implicit bias, much like combating any habit, involves “becoming aware of one’s implicit bias, being concerned about the consequences of the bias, and learning to replace the biased response with non-prejudiced responses—ones that more closely match the values people consciously believe that they hold.”⁵⁴

45. See Irene V. Blair, Jennifer E. Ma, & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCH. 828 (2001).

46. See Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combatting Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800 (2001); Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 PERSONALITY & SOC. PSYCH. BULL. 421 (2006).

47. See Nilanjana Dasgupta & Luis M. Rivera, *When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Group Members on Implicit Attitudes and Behavioral Intentions*, 26 SOC. COGNITION 54 (2008); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCH. 642 (2004).

48. See Kerry Kawakami, John F. Dovidio, Jasper Moll, Sander Hermesen, & Abby Russin, *Just Say No (to Stereotyping): Effects of*

Training in the Negation of Stereotypic Associations on Stereotype Activation, 78 J. PERSONALITY & SOC. PSYCH. 871 (2000).

49. See Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOCIAL PSYCH. 751 (2006).

50. See, e.g., MUZAHER SHERIF, O.J. HARVEY, B. JACK WHITE, WILLIAM R. HOOD, & CAROLYN W. SHERIF, *INTERGROUP CONFLICT AND COOPERATION: THE ROBBERS CAVE EXPERIMENT* (1961 ed.).

51. See Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCH. 5 (1989); Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133 (2002). For examples of how such communications can prime stereotypic actions and judgments, see JERRY KANG & MAHZARIN R. BANAJI, *FAIR MEASURES: A BEHAVIORAL REALIST REVISION OF “AFFIRMATIVE ACTION”* (2006).

52. See Devine, *supra* note 51.

53. Devine, *supra* note 51, at 16.

54. Bridget M. Law, *Retraining the Biased Brain*, 42 MONITOR ON PSYCH. 42, 43 (2011).

Once judges and court professionals become aware of implicit bias, examples of strategies they can use to help combat it and encourage egalitarianism are:

- Consciously acknowledge group and individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather than a color-blindness strategy in which one tries to ignore these differences);
- Routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful, deliberative, and self-aware process for inspecting how one's decisions are made);
- Identify sources of stress and reduce them in the decision-making environment;
- Identify sources of ambiguity and impose greater structure in the decision-making context;
- Institute feedback mechanisms; and
- Increase exposure to stereotyped group members (e.g., seek out greater contact with the stigmatized group in a positive context).

Those dedicated to the principles of a fair justice system who have worked to eliminate explicit bias from the system and in their own decisions and behaviors may nonetheless be influenced by implicit bias. Providing information on implicit bias offers judges and court staff an opportunity to explore this possibility and to consider strategies to address it. It also provides an opportunity to engage judges and court professionals in a dialog on broader race and ethnic fairness issues in a thoughtful and constructive manner:

Recognizing that implicit bias appears to be relatively universal provides an interesting foundation for broadening discussions on issues such as minority over-representation, disproportionate minority contact, and gender or age discrimination. In essence, when we look at research on social cognitive processes such as implicit bias we understand that these processes are normal rather than pathological. This does not mean we should use them as an excuse for prejudice or discrimination. Rather, they give us insight into how we might go about avoiding the pitfalls we face when some of our information processing functions outside of our awareness.⁵⁵



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The Honorable Roger K. Warren is President Emeritus of the National Center for State Courts, where he served as president and chief operating officer for more than eight years. Judge Warren also served as Scholar-in-Residence with the California court system and chair of the Board of Directors of Justice at Stake, a nonpartisan coalition of state and national organizations working to keep the nation's courts fair, impartial, and independent. Prior to joining the NCSC, Judge Warren served in the Sacramento, California, courts for two decades.



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55. Shawn Marsh, *The Lens of Implicit Bias*, 18 JUV. & FAMILY J. TODAY 16, 18 (2009)(acronyms omitted).



The Resource Page



WEBSITES OF INTEREST

Resource Guide for Courts on Combatting Implicit Bias

<http://www.ncsc.org/ibeducation>

The National Center for State Courts has put together an excellent collection of resources that courts and judges can turn to in addressing implicit bias (detailed in this issue in an excellent article by several NCSC researchers; see page 64). The website includes materials used in a pilot project with judges in three states (California, Minnesota, and North Dakota). The California website includes video presentations by several experts on emerging and settled research in neuroscience and social psychology, describing how unconscious or subconscious processes may affect our decisions. You can also find tests to see how you may be affected by implicit bias, and there are several resources you can look at for addressing the issue.

The article in this issue of *Court Review* is a good starting point, and this web-based set of resources enables you to explore the area much more fully, including the online tests.

Access Brief on Access-to-Justice Commissions

<http://www.ncsc.org/atj>

In our last *Court Review*, we told you of the National Center for State Court's new Center on Court Access to Justice for All, which seeks to assist judges and courts in providing better access to justice to everyone they serve. One key feature of the Center is a series of "Access Briefs," short papers on key topics in the field. Readers of this special issue may be interested in a new paper published in January 2013 in access-to-justice commissions (<http://goo.gl/OTXSo>).

According to the paper, twenty-seven states and the District of Columbia have

established access-to-justice commissions—most created since 2000—and several other states are presently looking into the possibility of doing so. The Access Brief also provides a useful collection of resources on existing commissions, with links to other web resources.

We do want to note one good resource that wasn't included in the Access Brief: Liz Neeley's 2009 *Court Review* article, "From Investigation to Implementation: Factors for Successful Commissions on the Elimination of Racial and Ethnic Bias" (<http://goo.gl/U8yRW>). Her article discusses a number of questions that are good to consider when setting up any statewide commission to address a specific issue. (And it also explains the work of the National Consortium for Racial and Ethnic Fairness in the Courts.)



NEW PUBLICATIONS

Future Trends in State Courts 2012

<http://www.ncsc.org/trends>

For more than two decades, the National Center for State Courts has been producing an annual look at "future trends" in the state courts. This has become a big-time process: In addition to National Center staff, there's now an Editorial Board just to provide feedback on each potential submission for the latest edition of this monograph.

The 2012 edition (which may be downloaded in its entirety at <http://goo.gl/wSBjw>) runs 165 pages and contains 31 separate articles. Key features of the Future Trends series are that the articles are short and easy to grasp, often contain a helpful chart or graph, and usually include further resources that can be used to explore that topic. So it's an enjoyable publication that provides an excellent overview of lots of issues affecting judges and their courts.

The 2012 edition focused on courts and the community, with articles on vet-

erans courts, housing courts, improved access to court for non-English speakers, how to encourage effective court-community collaboration, and how to better work with Indian tribes in child-protection cases. There also are groupings of articles on four other topics: court leadership, making better courts, court education, and the intersection between privacy policies and court technology.

NATALIE KNOWLTON & MALIA REDDICK, LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION (2012)

(<http://goo.gl/XfWbO>)

The Institute for the Advancement of the American Legal System at the University of Denver (IAALS) recently released a report that considers whether judicial-performance-evaluation programs are fair to women and minority judges. IAALS researchers Natalie Knowlton and Malia Reddick carefully consider whether implicit bias against women or minority judges might impact formal evaluations of their performance as judges.

Knowlton and Reddick looked closely at four states with long-established judicial-performance-evaluation programs—Alaska, Arizona, Colorado, and Utah. Although women and minority judges scored lower in evaluations by attorneys, the differences were quite small. But in detailed reviews of data from these states, they concluded that the differences, though small, "tend to be pervasive."

The study does a good job of summarizing the available data, past studies of bias in judicial-performance-evaluation programs, and general reviews of implicit bias in forming opinions about judges. Because implicit bias—to the extent it exists—could impact judicial-performance-evaluation programs "in ways that are difficult to detect," Knowlton and Reddick provide a series of recommendations to minimize it to the extent possible.